Filed 7/11/19 Jay v. Rock CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

DANFORD A. JAY et al., Plaintiffs and Appellants, v. CHRISTOPHER J. ROCK et al., Defendants and Respondents.	C068400 (Super. Ct. No. 145202) ORDER MODIFIFYING OPINION AND DENYING PETITION FOR REHEARING AND REQUEST FOR PUBLICATION [NO CHANGE IN JUDGMENT]
DANFORD A. JAY, Individually and as Trustees, etc., et al., Plaintiffs and Appellants, v. THE CITY OF CHICO et al., Defendants and Respondents.	C071967 (Super. Ct. No. 145203)

THE COURT:

It is ordered that the nonpublished opinion filed herein on June 12, 2019, be modified as follows:

1. On pages 3-4, at the end of footnote 2, and before the last sentence that begins with "We conclude," add at the end of that sentence, "or influenced or participated in the agreement between her parents and the City, Exhibit X."

   The sentence in its entirety will now read:

   > We conclude the petition fails to state facts supporting that she had anything to do with the Jays' contracts, or influenced the denial of the Jays' FBO application, or influenced or participated in the agreement between her parents and the City (Exhibit X).

2. On page 30, the last sentence of the second paragraph in subsection (a), delete the name "Jays" and replace with "Rocks."

   The sentence will now read:

   > They have not established a triable issue of fact that the Rocks, who had the lease for the ramp space, were not entitled to cordon it off.

3. On page 32, the last sentence at the last paragraph, add as footnote 21 the following, which will require renumbering of all subsequent footnotes:

   > The Jays filed a petition for rehearing after they requested an extension of time to file a petition for rehearing regarding the appeal of their case against the City, C071967. In making their request for an extension of time, the Jays expressly represented that they were not making a request for an extension of time regarding their case against the Rocks, C068400. They also represented that their request for an extension of time was not opposed by counsel representing the City defendants. The Rocks sent the court a letter informing the court that they had not been consulted and that they opposed the request for more time to file a petition for rehearing. We granted the Jays' request to extend time, but only as to the appeal in their case against the City defendants. In the Jays' petition for rehearing, inconsistent with their representation that their request for an extension of time related only to the appeal involving the City defendants, the Jays focus on language in the Discussion part I(B)(4)(d) relating to the summary judgment motion in the Jays' case against the Rocks. Because the Jays represented they were not requesting an extension of time to file their petition for rehearing as to that appeal and we granted their request only as the appeal involving the City defendants, we strike this portion of the petition for rehearing as untimely.

4. On page 54, delete the last sentence which begins with "Moreover" and replace it with the following:

Thus, under the City's standing rule, the potential pecuniary losses upon which the Rocks focused, the bias in the Commission's decision they alleged, and the encroachment upon their ramp space individually and cumulatively resulted in a significantly greater effect on them than the public in general. The Rocks had standing under CMC 2.80.040 and 2.80.05(A).

5. On pages 54-55 at footnote 30, change the first sentence to read as follows:

At oral argument and again in their petition for rehearing, the Jays argued that the Rocks never mentioned the ramp encroachment as an injury when they filed their notice of appeal.

Footnote 30 in its entirety with an additional second paragraph will now read:

At oral argument and again in their petition for rehearing, the Jays argued that the Rocks never mentioned the ramp encroachment as an injury when they filed their notice of appeal. But unlike the judicial gloss placed upon section 1086 when a party seeks a writ petition in superior court that requires a plaintiff to prove injury in fact by a preponderance of the evidence, there is no requirement in CMC 2.80.040 and 2.80.050(A)for a party appealing to the Council to prove injury in fact by a preponderance of the evidence. Additionally, because the Jays never objected on standing grounds, there was no reason for the Rocks to assert injury related to the Jays' use of the ramp space the Rocks were leasing.

In their petition for rehearing, the Jays contend that Jay's statement before the Commission in which he said he "*may* find it necessary at many times to drive across their ramp" did not mean there would in fact be encroachment. This contention is inconsistent with their own pleadings. The Jays alleged multiple times in the petition for writ of mandate that the ramp space the City leased to the Rocks left the Jays' building landlocked, and they included a photograph in the writ petition showing that the Rock's ramp space completely surrounds their building. Based on the Jays' own pleadings, some encroachment onto the Rock's ramp space by vehicles and/or foot traffic related to the Jays' proposed FBO operation would necessarily occur.

6. On page 92, before the last paragraph, add the following paragraphs:

In their petition for rehearing, the Jays rely upon *People v. Honig* (1996) 48 Cal.App.4th 289, for the proposition that *influence* can be proved by

circumstantial evidence. This court in *Honig* did say an *interest* can be proved by both direct and circumstantial evidence (*Honig*, at p. 315), but that case did not involve proof issues related to the influence/participation element of a conflict of interest claim because Honig was the person who personally made the decision to create the contracts at issue. (*Id*., at pp. 304, 318.) Nevertheless, we do not disagree that circumstantial evidence can establish the influence/participation element; but the facts pled here do not.

Quoting *People v. Gnass* (2002) 101 Cal.App.4th 1271,1294, the Jays assert, in connection with the influence/participation element, that we must "look past the individual contracts in question and consider *the relationships between all the parties connected with them, either directly or indirectly*, to determine if a conflict of interest exists[s]." Like in *Honig*, the *Gnass* court was discussing how the existence of an interest could be proved and not the influence/participation element. Nevertheless, we do agree that the relationship between the person alleged to have had a conflict of interest and the decisionmakers or persons who influenced the decisionmakers is a circumstance to consider. Here, no facts have been alleged showing that Ms. Rock, an assistant city attorney, was in a supervisory position over Burkland, who served as the deputy city manager and airport manager at the time Exhibit X was negotiated and executed, or Jones, the city manager. Nor have facts been alleged showing that Ms. Rock was in a hierarchal position within city government to influence Burkland or Jones at the time Exhibit X was negotiated and executed.

This modification does not change the judgment. In case No. C068400, Appellants' petition for rehearing is denied. In case No. C071967, Respondent's request for publication is denied.

FOR THE COURT:

/s/
RAYE, P. J.

/s/
ROBIE, J.

/s/
MURRAY, J.

Filed 6/12/19 Jay v. Rock CA3 (unmodified opinion)

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

DANFORD A. JAY et al., Plaintiffs and Appellants, v. CHRISTOPHER J. ROCK et al., Defendants and Respondents.	C068400 (Super. Ct. No. 145202)
DANFORD A. JAY, Individually and as Trustees, etc., et al., Plaintiffs and Appellants, v. THE CITY OF CHICO et al., Defendants and Respondents.	C071967 (Super. Ct. No. 145203)

This opinion involves appeals in two cases, consolidated for argument and disposition. In both matters, we affirm the judgments.[1]

[1] Subsequent to filing the appeal in the second case, the Jays moved to consolidate the related cases, Nos. C068400 and C071967, for argument. We granted their motion to

The litigation involves a dispute arising out of the City of Chico's (the City) rejection of the plaintiff Danford Jay's application to operate as a fixed base operator (FBO) at the Chico Municipal Airport (the airport). Instead of addressing the deficiencies in the application and reapplying, plaintiffs Danford Jay and Sandra Jay (collectively, the Jays) filed these two actions.

In the first appeal, the Jays appeal from summary judgment in favor of defendants Christopher Rock, Maria Rock, and their business, Northgate Aviation, Inc. (collectively, the Rocks). The Jays alleged that the Rocks interfered with several contracts the Jays asserted they had with the City regarding FBO operations at the airport. In their motion for summary judgment, the Rocks contended that the Jays failed to raise a triable issue of fact that the City breached any contract with the Jays and that the Rocks induced the breach. The trial court agreed and granted summary judgment.

On appeal, the Jays contend that (1) the trial court erred in excluding a declaration by Douglas Guillon, the Jays' predecessor in interest, and (2) the trial court erred in granting summary judgment, because they presented evidence establishing triable issues of fact, which included the Guillon declaration.

The Rocks contend that Guillon's declaration was properly excluded and that the Jays failed to supply admissible evidence to support their argument that they were successors in interest to the several contracts at issue and even if they did make this showing, the contracts do not afford the Jays the contractual rights they claim. Thus, according to the Rocks, the City did not breach any contractual duties to the Jays. The Rocks further assert that even if the Jays had the contractual rights they claim, the City did not breach any rights under the contract, nor did the Rocks do anything to induce the breach.

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consolidate for oral argument and we hereby consolidate these cases for disposition as well.

We conclude that the trial court did not err in granting summary judgment because Guillon's declaration was properly excluded and the remaining evidence is insufficient to support the Jays' theory of their contractual rights and the City's alleged breach of contract. We also conclude that the Jays failed to establish a triable issue of fact as to their claim that the Rocks induced a breach.

In the second appeal, the Jays appeal from an order sustaining the demurrer to their petition for writ of mandate, in favor of the City, City Council of Chico, Councilmembers Steve Bartagna, Mary Flynn, Scott Gruendl, Andy Holcombe, Tom Nickell, Ann Schwab, and City Manager David Burkland. In their petition, the Jays challenged the city council's (the Council) decision denying their application to become an FBO at the airport. They also challenge the City's decision to allow the Rocks to operate as an FBO and assert that the Rocks' contract is void. The City demurred, and the trial court sustained the demurrer without leave to amend.

On appeal, the Jays contend that the trial court erred because the petition properly alleged: (1) the Council lacked jurisdiction to review the airport commission's earlier decision granting the Jays' FBO application; (2) the Council's decision denying the Jays' FBO application is not supported by findings and substantial evidence; (3) the City's FBO contract with Northgate Aviation, Inc., is void; and (4) several claims that the Council's hearing and decision violated various fair hearing rights, including equal protection and due process, which were not raised during the Council hearing.[2]

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[2] After briefing was complete, the Jays filed a motion to consider new evidence on appeal relating to their allegations of conflict of interest, which is one of the grounds upon which the Jays rely in their claim that the City's contract with Northgate Aviation, Inc. is void. The allegation involves the Rocks' daughter, Alicia Rock, an assistant city attorney for the City. The Jays contend that this new evidence demonstrates their ability to amend the petition to establish that instead of an indirect conflict of interest, Alicia Rock had a direct conflict of interest. The motion is primarily based on Code of Civil Procedure section 909, which allows appellate courts to "take additional evidence of or

We conclude that the trial court did not err in sustaining the demurrer to the writ petition without leave to amend.

We affirm in both appeals.

FACTUAL AND PROCEDURAL BACKGROUND

The 1988 Contracts

Under the City's "Standards for Conducting Aeronautical Activities" at Chico Municipal Airport (the Standards),[3] an FBO provides certain aeronautical services for the airport, including at least four of the following: aircraft charter (Air Taxi), aircraft fuel sales, aircraft tie-down, aircraft maintenance, and flight training. (Standards, § II(E)(1)-(5).) The Standards establish certain mandatory requirements for becoming an FBO and providing FBO services.

The Jays' claims in their litigation against the Rocks are based on a series of 1988 agreements involving Douglas and Deborah Guillon and their partners (collectively, the

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concerning facts occurring at any time prior to the decision of the appeal" in cases where there is no right to jury trial and "for any . . . purpose in the interests of justice." In the alternative, the Jays seek relief *coram vobis*. Code of Civil Procedure section 909 "should be invoked sparingly, and only to affirm the case." (*Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1213; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 42; *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1090.) The Jays provide no authority applying Code of Civil Procedure section 909 to an appeal to reverse a trial court's decision to sustain a demurrer. And they provide no authority allowing them to amend their pleading after briefing on appeal has been completed. In any event, given our discussion *post* concerning the conflict of interest claim, it does not matter whether Alicia Rock's alleged conflict of interest was direct or indirect. We conclude the petition fails to state facts supporting that she had anything to do with the Jays' contracts or influenced the denial of their FBO application. Accordingly, we deny the motion to consider new evidence.

[3] The Standards are found in the City's Administrative Procedure and Policies Manual (AP&P No. 90-6.)

Guillons). Some of the claims made in the Jays' petition for writ of mandate also relate to these agreements.

On July 6, 1988, the Guillons entered into an agreement with the City to lease certain real property at the airport and construct a building on that property at their own expense (exh. V). The agreement provided that the Guillons would construct the building, lease the land on which it was built, and could lease the building to a third party with the consent of the City. Under the lease, upon termination of the lease, all improvements including the building would become the property of the City. Pursuant to this agreement, the Guillons or their sublessees could conduct certain aviation-related businesses on the leased property for a term of up to 50 years in renewable increments. Although exhibit V specifies that the Guillons may provide various non-FBO services on the leased property, in his deposition, Guillon stated that he designed the building on the property "specifically to perform the FBO function," and it "could only be used to perform the FBO function." While exhibit V provides for the construction of a building according to certain plans and specifications, it does not provide that the building must be used only for the FBO function or even that the primary purpose of the building would be to perform FBO functions. Exhibit V also provided Guillon with a "nonexclusive right" to use the "runways, taxiways, *common use portions of the aprons*."[4] (Italics added.) However, the use of such facilities was "subject to the City's continuing right to direct and control such use."

On July 7, 1988, WestAir, Industries, Inc. (WestAir), entered into an agreement with the Guillons to lease the building the Guillons were to construct (exh. V-1). The Guillons limited the use to which WestAir could make of the premises to use as a FBO office.

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[4] Throughout the litigation in these two cases, the words "ramp and "apron" are used interchangeably.

On July 6, 1988, the Guillons and the City executed a lease assumption agreement between them and the City. (Exh. V-3.) This agreement provides that the Guillons had the right to assume all the rights and duties of WestAir, the then existing FBO for the airport, in the event that WestAir defaulted and the City then decided to terminate the lease or if WestAir terminated its lease *with the City*, exhibit V-2. However, the Guillons' right to assume WestAir's rights is not triggered under V-3 if WestAir terminated its lease with the Guillons and not the lease with the City.

Additionally, on July 8, 1988, WestAir entered into a separate agreement with the City to lease a 3.52-acre ramp area adjacent to the Guillons' leasehold, a hangar, and additional property containing both aboveground and belowground fuel storage tanks "for the purpose of engaging in the business of a fixed base operator." (Exh. V-2.) WestAir was given the exclusive right to the 3.52-acre ramp area. The Guillons are not mentioned as a party in this agreement and Guillon did not sign it. Guillon admitted he is not a party to this agreement.

Guillon Sale to the Jays

On March 3, 2005, the Guillons sold the building they constructed on their leasehold to the Jays. On August 15, 2005, the City agreed to allow the Jays to assume the Guillons' rights under exhibit V to the leasehold in an agreement entitled, "Consent to Assignment and Assumption Lease of Real Property" (exh. W). However, the Jays did not acquire any interest in the adjacent 3.52-acre ramp area, the hangar, or the additional property containing fuel storage tanks leased to WestAir by the City. Exhibit W does not reference any assignment or assumption of rights under the several other contracts, exhibits V-1, V-2, or V-3. At the time of the sale, the leasehold in exhibit V was no longer being subletted to WestAir, but rather was being subletted to Redding Aero Enterprises, Inc., who was at that time operating as the sole FBO at the airport.

Redding Aero Sale to the Rocks

On October 14, 2005, the Rocks purchased Redding Aero's physical assets in an asset purchase agreement. Following the asset purchase, the Rocks took over the FBO services that Redding Aero had been performing. Initially, the Rocks leased a portion of the Jays' building from them to provide FBO services.

On July 20, 2007, the Rocks entered an agreement with the City to lease the separate hangar space and the 3.52-ramp area to perform FBO functions for the airport (exh. X). This hangar space, like the Jays' building, was also adjacent to the 3.52-acre ramp area. Exhibit X required that the Rocks use the leased property "solely for the purpose of engaging in the business of a fixed base operator thereon." Exhibit X further provides that the right to perform FBO services is "nonexclusive," as required by the Airport and Airway Improvement Act of 1982 (AAIA). (49 U.S.C. §§ 40103(e), 40107(a)(4).) However, City Manager Dave Burkland told the Rocks that although their agreement to provide FBO services was nonexclusive, "any request from an individual or company to provide FBO services at the airport would have to be evaluated to determine the need for any additional FBO services before the City would consider entering into a lease with a new vendor."

In a letter dated November 20, 2007, the Rocks terminated their lease with the Jays and later moved all of the FBO functions from the Jays' building to the hangar they leased from the City. The Rocks operated their FBO services under the name of Northgate Aviation, Inc. (Northgate).

The Jays' FBO Proposal to the Commission

On February 26, 2008, the Jays submitted a written proposal to the airport commission (the Commission) to operate a second FBO at the airport out of their building.[5]

At the request of the Commission, Burkland, the former city manager and airport manager, reviewed the Jays' proposal. He issued an agenda report and recommendation to the Commission dated April 29, 2008, for the Commission meeting originally to be held on that date. Burkland recommended that the Jays' application be denied for various reasons.[6]

At a meeting on July 29, 2008, the Commission approved the Jays' proposal.

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[5] In his application, Jay asked that the Commission make three findings. One of the requested findings read: "Under the authority of Minimum Operating Standards, General Provisions, Section IV.A, find that it is '*in the best interests of the City and airport users*' that [the Jays] *begin operations immediately* and consummate its operating agreement with the City as soon as possible." Under the Standards section IV(A), such a finding would have allowed the Jays to begin operations before the negotiations on related contracts were completed and the agreements signed. That provision reads: "All aeronautical operators shall comply with the following provisions, requirements and conditions in connection with their conduct of an aeronautical activity(ies) at the Airport. [¶] A. Operators shall be required to enter into an appropriate form of lease, license agreement, agreement of sale or such other form of written relationship with the City as the Airport Commission may require, which shall incorporate such provisions of these Standards, together with such other further provisions and requirements, as the Commission shall deem appropriate. *The foregoing shall have been accomplished prior to the commencement of any activity(ies) by an operator, unless in the best interest of the City and for the benefit of Airport users, the City Manager/Airport Manager or Commission shall waive the requirement, in which case such an agreement, lease or other form of legal document shall be consummated as soon as practicable thereafter*." (Italics added.) The record does not reflect that the Commission ever made such a finding and the Jays did not begin operations immediately as they requested.

[6] We discuss the Jays' application, Burkland's agenda report, and attached staff analysis and the Commission hearing in more detail *post*, in our discussion on the Jays' writ petition.

The Rocks' Appeal to the Council

On July 30, 2008, the Rocks filed an application for appeal to the Council, which challenged the Commission's approval of the Jays' application on the grounds that the decision was contrary to the staff report recommendation, the decision would damage the Airport and the existing FBO and several of the commissioners were biased in approving the application.

Burkland's Agenda Report to the Council

In preparation for the hearing on the Rocks' appeal, Burkland issued an agenda report to the Council dated September 2, 2008, which explained his previous city staff recommendation to the Commission, included the staff analysis attached to his agenda report to the Commission and again recommended that the Jays' application be denied. Burkland stated that the Jays' business had not demonstrated "financial stability and operational capability as required by the City's minimum standards," and opined that the airport could not support two FBOs at that time.

Council Hearing

On September 2, 2008, the Council held a public hearing on the Rocks' appeal of the Commission's decision to allow the Jays to operate as a second FBO at the airport. The Council heard from Burkland, the assistant city attorney, city clerk, the Rocks, the Jays, and members of the Commission regarding issues of: (1) the alleged bias by the Commission in approving the Jays' application; (2) whether the City has the authority to deny an application for a second FBO based on the viability of multiple FBOs; (3) whether by denying the Jays' FBO application, the City would violate the FAA rules prohibiting exclusive rights for FBOs; and (4) whether the Jays' proposal met the minimum requirements to provide FBO services under the Standards.[7]

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[7] We discuss Burkland's agenda report to the Council and attached staff analysis and statements he, the assistant city attorney, the Commission chair, the Jays and the council

The Council voted to accept the city manager's recommendation to uphold the Rocks' appeal and deny the airport commission's recommendation. The Jays did not submit a revised FBO application addressing the deficiencies in their application discussed during the Council hearing.

Trial Court Proceedings—*Jay v. Rock*, No. C068400

The Jays filed a complaint in Butte County Superior Court against the Rocks, the City, the individual members of the Council and City Manager Burkland. The Jays amended their complaint several times, the most recent version being the fifth amended verified complaint. Among numerous other allegations, the complaint alleged that the Rocks induced the City to breach a contract with the Jays. The claim alleging inducement of a breach of contract is the only subject of this appeal.

The Rocks filed a motion for summary judgment. Regarding the inducement of breach of contract claim, the Rocks argued that the Jays did not have the rights they claimed under the various Guillon contracts, and the City did not breach these contracts. Specifically, the Rocks contended that the Jays obtained only an interest in the Guillons' leasehold under exhibit V and the consent to assignment and assumption, exhibit W, and that the Jays obtained no rights under exhibits V-1, V-2, and V-3 because the latter three contracts were not specifically assigned to the Jays in exhibit W. In particular, the Jays were never successors in interest to WestAir, and WestAir's lease from the City of the 3.52-acre ramp space in exhibit V-2. The Rocks asserted that because the Jays did not establish that they were parties to exhibits V-1, V-2, or V-3, the Jays could not establish a breach. Because they argued that the Jays could not establish a breach, the Rocks did not need to reach the issue of whether there were material disputed facts on the inducement element.

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members made during the council hearing in detail *post*, in connection with the Jays' appeal on the writ petition.

In opposition to the Rocks' motion for summary judgment, the Jays submitted various declarations in support of their position that they had certain rights under exhibits V-1, V-2, and V-3, in addition to the assignment of rights under exhibit V. The Jays contended that the City "breach[ed] the July 1988 Agreement [collectively, Exhibits V, V-1, V-2, and V-3] by conveying to [the Rocks] the very rights (to compete by assuming the FBO Function and leasing the FBO Property) granted Plaintiffs' predecessor in interest, Douglas Guillon, in 1988." The Jays contended that this breach "was accomplished through Complaint Exhibit X," which "convey[ed] the exclusive right to Apron access" to the Rocks.

The Rocks objected to portions of the Jays' declarations. Pertinent to this appeal, the trial court sustained the objections to Guillon's declaration, excluding it entirely. The trial court advised counsel for the Jays that though most portions of the declarations were excluded because the declarant lacked personal knowledge, made legal opinions, or provided improper parol evidence, the court would consider admissible evidence from the deposition testimony. The court continued the hearing to the following week so that over the weekend the Jays would have the opportunity to identify admissible evidence in their separate statement from the depositions that created a triable issue of fact. The court told counsel "[i]f it's not admissible I can't consider it," and counsel replied, "I totally understand."

However, when the court reconvened on Monday, the Jays' counsel asked for a continuance to revise the inadmissible declarations "with respect to form," and include them in a new separate statement. Counsel proffered that the supplemental declarations would not change the substance of what had been presented. The court denied the continuance, noting that the inadmissible portions of the declarations were not excluded for form but because of "evidentiary objections to the substance of the declarations." The court then allowed the Jays' counsel to identify the remaining admissible evidence that would create a triable issue of fact.

Following the hearing, the trial court granted the Rocks' motion for summary judgment. Regarding the inducement of breach of contract claim, the court ruled that exhibit W referenced only the single contract that was assigned and the other 1988 contracts "do not fall under C.C.P. [section] 1642 because the contracts involved different parties, different subject matters and were differently termed agreements for different purposes." Accordingly, the court concluded that the " the inducement of breach of contract claim failed because [the Jays] were unable to establish any admissible, material evidence demonstrating a triable issue of material fact that they were parties to a contract allegedly breached by the City of Chico or that [the Rocks] intentionally attempted to induce the City to breach any contract."

Trial Court Proceedings—*Jay v. the City of Chico*, No. C071967

In a separate action against the City, on November 20, 2008, the Jays filed writs of traditional and administrative mandate.

On July 19, 2011, the Jays filed the operative pleading, a second amended verified petition for writ of mandate, administrative mandamus and/or for alternative writ (the petition), consisting of 151 pages and containing 534 allegations, many of which are redundant. The City demurred and moved to strike the petition on the grounds that contrary to the Jays' allegations: (1) the Council had the authority under the city charter and its municipal code to review the decision of the Commission; (2) the City's contract with Northgate was not void because of an alleged conflict of interest or because the City did not require Northgate to demonstrate qualifications under the Standards; (3) the City did not violate the AAIA FBO exclusive rights prohibition;[8] (4) the Jays failed to present

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[8] The AAIA requires that airport sponsors that obtain federal grant funds provide an assurance that "a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport." (49 U.S.C. § 47107(a)(4).) As a shorthand, we will refer to this rule as the FBO exclusive rights prohibition. We discuss the prohibition and its statutory exception in more detail, *post*.

arguments alleged in the petition to the Council during the Council hearing and thus, those arguments are forfeited; (5) the Council's decision was based on substantial evidence, including the City staff analysis and Jays own statements made during the Council hearing, which showed the Jays failed to meet the minimum standards to operate as an FBO; (6) the Council made adequate findings; (7) the Jays' due process rights were not violated; (8) the City did not interfere with the Jays existing lease; (9) the Jays did not have a vested right to operate an FBO business at the airport pursuant to the Commission's initial approval; and (10) the appeal proceeded consistent with the notice of appeal from the Commission's decision filed by the Rocks.

On June 12, 2012, the trial court issued an order sustaining the demurrer. The court noted that the Jays failed to preserve their arguments by not raising them during the Council hearing, but proceeded to evaluate each of their claims on the merits.

The court ruled that contrary to the allegations in the petition, the City had the authority to hear the appeal and reverse the decision of the commission, reasoning that the City's appeal ordinance challenged by the Jays was consistent with the express terms of Section 1000 of the City's Charter, which "provides that City boards and commissions ' . . . shall have the powers and duties provided for in this charter and/or established by ordinance or resolution of the council,' " and that the commission's authority in the Charter is limited by the Council because "Charter Section 1000 specified that no commission or board shall have power ' . . . deemed to be equal to or greater than that of the [C]ouncil.' " The court ruled that "subject to the *express* terms of the Charter, the . . . Council is provided with near plenary power over City commissions and boards." The court further noted that the Jays cited no provision in the Charter that unequivocally states the commission is exempt from the plenary authority of the Council or any provision the expressly precludes a right of appeal from its decisions.

The court further ruled that Chico Municipal Code (CMC) section 2.80.050, subdivision (b), which expressly provides for such appeals, was not inconsistent with the

Charter, stating "[g]iven the apparent grant of plenary authority to the . . . Council, it would be incongruous to hold that, while the Council can, subject to the express terms of the Charter, specify and delimit the authority and jurisdiction of the . . . Commission, it has no power to review the . . . Commission's performance and decisions."

Contrary to the petition's allegations that the Council's decision was not based on substantial evidence, the trial court found that it was as a matter of law, ruling that the Council's decision to deny the Jays' FBO application "was based on an extensive analysis by City staff regarding the Jays' FBO operational capabilities or lack thereof, and the economic reality of FBO operations at the airport." The court indicated that it also considered Danford Jay's statements at the hearing where "he acknowledged that he was at that time unable to demonstrate all the operational capabilities called for by the written minimum standards . . . and his admission that his application contained inaccuracies."

Regarding the claim in the petition that the Council failed to make findings, the trial court ruled that findings could be informal and the remarks of the Council members, the colloquy concerning the Jays' operational capabilities and the express adoption of the city manager's agenda report were sufficient findings.

The trial court further found that the Council was not mandated under the AAIA's FBO exclusive rights prohibition to approve the Jay's application (49 U.S.C. § 47101 et seq.). The court ruled that given its conclusion the City had adequate grounds to find the Jays did not meet minimum operational requirements, "the denial of their application was proper and no 'exclusive right' to operate as an FBO was created in the existing FBO."

Regarding the alleged conflict of interest involving Alicia Rock, who is a member of the city attorney's office and the daughter of the Rocks, the court found, inter alia, that there is nothing in the record that indicates the daughter had any involvement with Commission matters after 2005.

The court rejected the Jays' claim in which they sought to void the existing FBO contract with Northgate on the grounds that Northgate was not required to make financial stability and operational capability showings. The court ruled that the Northgate's contract came into being under different circumstances; it took over for an existing FBO and had thereafter satisfactorily ran the FBO operations for two years.

Regarding the impairment of contract claim, the court ruled that because a second, "more comprehensive application," by the Jays "might be met with approval," the Council has not deprived the Jays of the benefits of their contracts.

The court also rejected the Jays' claims related to lack of notice and insufficient time to present their case to the Council.

Finding that the Jays could not cure the defects in their Second Amended Petition based on the record before it, the court sustained the City's demurrer without leave to amend.

DISCUSSION

I. *Jay v. Rock,* No. C068400

A. Exclusion of Douglas Guillon's Declaration

1. Additional Background and the Jays' Contentions

In opposing the Rocks' motion for summary judgment, the Jays relied heavily on Guillon's declaration, particularly his opinions about the intent of the various parties in executing the 1988 contracts. Although he was not a party to exhibit V-2, Guillon's declaration purported that the parties intended that exhibits V, V-1, V-2, and V-3 be taken together. The central purpose of Guillon's declaration was to establish that the 1988 contracts were ambiguous and to provide extrinsic evidence to aid the court in interpreting the contracts. To this end, Guillon stated: "[T]he four documents comprising the July, 1988 agreement failed to be a complete and exclusive statement of the terms of our agreement, and was not intended to be such. The agreement Mr. Davis

[former city manager and airport manager] and I reached appears to have been lost to some extent in translation into the written language contained in Exhibits V -- V-3."

The Rocks raised multiple objections to virtually all of the substantive portions of Guillon's 16-page declaration, and the trial court sustained their objections.[9] The trial court sustained objection No. 4, excluding page 1, line 3, to page 16, line 19, which is the entire substance of the declaration,[10] on numerous grounds argued by the Rocks,

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[9] The Rocks also made the same objections to the other declarations the Jays submitted in opposition to the Rocks' summary judgment motion. The trial court sustained those objections and the Jays do not seek review of those rulings.

[10] Much of the substance of Guillon's declaration is set forth in the "SUMMARY OF DECLARATION." In pertinent part, the summary reads as follows: "In 1988, the City and I divided the benefits and burdens of constructing a modern FBO-specific facility at the Chico Municipal Airport as follows: It was understood and discussed between Fred Davis, the City Manager at that time, and myself that the City would not have a financial stake in the project so it was agreed that I would put up all the money. [Fn. omitted.] In addition, it was agreed that I would design the building and I would construct the building 'at (my) sole cost and expense.' After construction, I would pay the City rent which grew from nominal to fair market value with the passage of time, and at the end of the term of our agreement, the City would take title to the building free and clear. ¶ That is what the City got. What I got was a security that I could recoup my investment over the term of our agreement. [Fn. omitted.] *That security, it was agreed, included a commitment by the City to provide the only thing that it could: control over the Fixed Base Operator ("FBO") function at the airport. Because the only source of revenue available was from the building to be constructed itself, because the building was designed specifically for the FBO function, the City committed to require any approved FBO to lease the building during the term of our agreement.* [Fns. omitted] That provided the cash flow. If a leasing FBO defaulted, failed to renew, or if there was no available FBO, I had the right to provide the FBO function myself. I could do so by utilizing the building I was to construct . . . and to lease from the City the other facilities needed by FBO's to function (the WWII hangar . . . , fuel storage area, and access to the Apron adjacent to the FBO building." (Italics added.) "*In the event no FBO was available to lease the FBO building or interested in doing so, I had the right to assume the FBO function* and lease the FBO property and generate revenue employing the FBO building myself." (Italics added.) Later in the summary, Guillon discussed exhibit X, the lease agreement between the City and Northgate. Guillon wrote, "apparently the City purported to grant to Northgate all of the rights and all of the property interests it granted

including: lack of personal knowledge, legal opinion and argument, irrelevance, and hearsay.[11] The court also sustained objection No. 5, excluding page 5, line 14 to page 9, line 2,[12] and page 11, line 26, to page 13, line 6,[13] on the additional basis that it was inadmissible parol evidence under Code of Civil Procedure section 1856 and legal opinion. The Jays contend that the court erred in sustaining both objections. We disagree.

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to me in July, 1988 as security for the recoupment of my investment in the event of an FBO default or failure to renew under Exhibit V-2, the City-West Air agreement." Regarding allowing Northgate to lease the 3.52 apron space, Guillon wrote, "In my opinion, that was a breach of my security rights" because "[t]he City had an FBO which was allowed to ignore the obligation to lease the FBO building, the City did not allow me to assume the FBO function myself to protect my security, but finally, while the City had restricted the use of the FBO building exclusively to the FBO function, it made use of the building for that purpose practically impossible by stripping the building of access to the adjoining Apron."

[11] The Rocks also objected on the grounds that the declaration violated rule 3:1113(d) of the California Rules of Court regarding permissible length of briefs in opposition to a motion for summary judgment.

[12] The heading for this portion of the declaration summarizes the text that follows and reads: "THE INTENT OF THE PARTIES TO THE JULY, 1988 AGREEMENT WAS TO PROVIDE SECURITY FOR RECOUPMENT OF THE COST AND EXPENSE OF CONSTRUCTING THE FBO BUILDING DURING THE TERM OF THE CITY-GUILLON AGREEMENT DATED JULY 6, 1988."

[13] The heading in which this part of the declaration can be found summarizes the text that follows and reads: "THE AGREEMENT BETWEEN THE PARTIES IS CONTAINIED IN FOUR SEPARATE WRITINGS, ALL EXECUTED IN JULY, 1988, ALL BETWEEN THE SAME CONTRACTING PARTIES, AND ALL RELATING TO THE SAME TRANSACTION." The subheading which begins on page 11, line 26, and includes the text through page 13, line 6, reads: "The *City-Drafted Variation* in the Term of the City-West Air Agreement (Exhibit V-2 . . .) and the City-Guillon-West Air Assumption Agreement (Exhibit V-3 . . .) Was Not Made Known to Me at the Time and Was Not Intended to Impact My Security." (Italics added.)

2. Analysis

a. General Principles Related to Evidentiary Rulings on Summary Judgment Motions

"Although it is often said that an appellate court reviews a summary judgment motion 'de novo,' the weight of authority . . . holds that an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard." (*In re Automobile Antitrust Cases I & II* (2016) 1 Cal.App.5th 127, 141; *Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226; accord, *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852; *Miranda v. Bomel Const. Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) We agree with this weight of authority. "The trial court is 'vested with broad discretion in ruling on the admissibility of evidence.' [Citation.] '[T]he court's ruling will be upset only if there is a clear showing of an abuse of discretion.' [Citation.] ' "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." ' " (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431 (*Tudor Ranches*).)

b. Contract Interpretation Principles

The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time of the contract. (Civ. Code, § 1636; *Capitol Steel Fabricators, Inc. v. Mega Construction Co.* (1997) 58 Cal.App.4th 1049, 1056.) Courts must look first to the contract language itself. (Civ. Code, §§ 1638, 1639; *County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 415.) "The mutual intent of the parties is ascertained from the contract language, which controls if clear and explicit." (*Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd.* (2010) 189 Cal.App.4th 101, 110-111 (*Fireman's Fund*).) "Extrinsic evidence is

admissible to explain the meaning of a contract only where it is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 560.) *If the contract language is unclear,* the court may consider evidence of the parties' discussions when the contract was negotiated and the surrounding circumstances so that the court can "place itself in the same situation in which the parties found themselves at the time of contracting." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165, 1167-1168.) However, "extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written [integrated] contract," but only to interpret ambiguous terms in the contract. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39 (*Pacific Gas*).) Here, each of the 1988 agreements contained an integration clause.[14]

c. Objection Number 4

The Jays contend that Guillon's declaration was based on his personal knowledge because he was "a party to the 1988 agreements" and therefore "could give relevant and competent evidence on 'the circumstances under which' the agreements were made and 'the matter to which' they relate, and to explain 'ambiguity' (are they one agreement or

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[14] Exhibit V's integration clause reads: "AMENDMENTS [¶] This lease may be modified or amended only by a writing duly authorized and executed by both City and Lessee. *It may not be* amended or *modified by* oral agreement *or understanding* between the parties unless the same shall be reduced to writing duly approved and executed by both parties." (Italics added.) Exhibit V-1's integration clause reads: "ENTIRE AGREEMENT; AMENDMENTS: This lease contains the entire agreement of the parties and *supersedes all prior negotiations, drafts, and other understandings* which the parties may have concerning the subject matter hereof. This lease may not be modified except by written instrument duly executed by the parties hereto or their successors in interest." (Italics added.) Exhibit V-2's integration clause reads the same as the integration clause in exhibit V. Exhibit V-3's integration clause reads: "The agreement contains the entire agreement of the parties with regard to all of the matters set forth therein and may not be amended or modified except by a writing duly authorized and executed by both City and Guillon/Jefferies."

four agreements?), and 'context.' " (Citing *Fireman's Fund, supra,* 189 Cal.App.4th at p. 111).

The Jays further contend that "much of the declaration was *not* hearsay," but they do not identify which portions were hearsay and which were not. The Rocks objected to the entire substance of Guillon's declaration, contending that it was "replete with references that make clear Guillon has no actual personal knowledge of the 'facts' to which he is declaring under penalty of perjury." Specifically, the Rocks complained that Guillon qualified many of his factual assertions throughout the declaration with phrases such as "I am informed," "as the facts as I understand them seem to make clear," "[i]t appears that," "[i]n my opinion," "it seems very likely," and "I believe." Additionally, throughout the declaration, Guillon cites the deposition of another person, Fred Davis, to support his factual assertions.

On appeal, the Rocks argue that Guillon's equivocal statements throughout the declaration and reliance on Davis's deposition testimony as a source both constituted hearsay and demonstrated his lack of personal knowledge, making the factual assertions in his declaration inadmissible. Additionally, they contend that Guillon's declaration "purports to describe at length what rights he was afforded under the various contracts," which is "impermissible legal opinion under Evidence Code section 800."

We conclude that the trial court did not abuse its discretion in excluding Guillon's declaration based on lack of personal knowledge. In order to be admissible evidence, a declaration must be based on personal knowledge in accordance with Evidence Code section 702, subdivision (a). "The same rules of evidence that apply at trial also apply to the declarations submitted in support of and in opposition to motions for summary judgment. Declarations must show the declarant's personal knowledge and competency to testify, state facts and not just conclusions, and not include inadmissible hearsay or opinion." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761.)

"The phrase 'To the best of my knowledge' indicates something less than the 'personal knowledge' required under Code of Civil Procedure section 437c, and implies that the declarant's statement is based on something similar to information and belief." (*Bowden v. Robinson* (1977) 67 Cal.App.3d 705, 719 -720, citing Code Civ. Proc., § 431.30.) Guillon's declaration not only uses qualifying phrases such as "I am informed" to introduce factual assertions throughout but expressly cites another witness's deposition to support his factual assertions. Therefore, the trial court did not "exceed the bounds of reason" in sustaining the Jays' objection to Guillon's declaration for lack of personal knowledge. (Cf. *Tudor Ranches, supra*, 65 Cal.App.4th at p. 1431.)

Additionally, Guillon's declaration contains legal opinion and conclusions throughout. For example, Guillon provides his own interpretation of the rights and obligations under the contractual terms and declares them as facts; he declares that the City breached its agreement with him; he declared that the City revoked the right held by the Jays as assignees of his rights to provide FBO function at the airport. The trial court did not "exceed the bounds of reason" in sustaining the Rocks' objection to Guillon's declaration based on legal opinion and conclusion.

It is the appellant's "burden on appeal to affirmatively challenge the trial court's evidentiary ruling, and demonstrate the court's error." (*Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114.) Here, the Jays have failed to carry their burden to affirmatively show error in the trial court's rulings on the evidentiary objections as to specific portions of the declaration they claim are admissible. They make no attempt to demonstrate how each evidentiary ruling was erroneous. They have not provided an analysis showing what statements were improperly excluded for lack of personal knowledge, hearsay and legal opinion. Simply claiming that Guillon, "as a party to the 1988 agreements, could give relevant and competent evidence" about the agreements does not demonstrate that Guillon's declaration actually provided relevant and competent evidence. In arguing only generalities in their opening brief, citing just one case for the

general rules of contractual interpretation therein,[15] and merely repeating the same argument on evidentiary rulings in their reply brief, the Jays' briefs do not contain "argument and citations to authority as to why the trial court's evidentiary rulings were wrong." (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1198.) Because the Jays failed to support their challenge regarding the grounds of lack of personal knowledge, hearsay, and inadmissible legal opinion and conclusion with reasoned argument and citations to authority demonstrating that the court erred in sustaining the objections to Guillon's declaration, we agree with the Rocks that the court did not abuse its discretion in sustaining objection No. 4.

d. Objection Number 5

The Jays contend that the court erred in excluding portions of Guillon's declaration under the parol evidence rule in Code of Civil Procedure section 1856[16]

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[15] In their opening brief, the Jays cited, *Fireman's Fund, supra*, 189 Cal.App.4th at page 111 where the court wrote: "Contracts are interpreted so as to give effect to the mutual intention of the parties at the time of contracting, to the extent ascertainable and lawful. [Citations.] The mutual intent of the parties is ascertained from the contract language, which controls if clear and explicit. [Citations.] Where necessary, a contract may be interpreted by reference to the circumstances under which it was made or the matter to which it relates. [Citations.] Several related contracts may be interpreted together, if between the same parties and part of substantially the same transaction. [Citation.] Extrinsic or parol evidence may be used to explain ambiguity, context or related matter." (*Ibid*.) The *Fireman's Fund* court did not discuss what might be competent evidence to prove these things.

[16] Code of Civil Procedure section 1856 states in pertinent part: "(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement. [¶] (b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement. [¶] . . . [¶] (g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined

"because section 1856 excludes only evidence that 'contradicts' a written agreement, [citation], whereas Guillon's declaration sought to resolve an ambiguity, as permitted under the *Fireman's Fund* decision." Conversely, the Rocks contend that Guillon's declaration attempts "to show terms different than the written agreement[s]" and is therefore inadmissible parol evidence. The trial court sustained objection No. 5 on this ground.

In *Pacific Gas*, our Supreme Court established rules governing the use of parol evidence to determine the meaning of contractual language where the contract appears clear and unambiguous and is "integrated." (*Pacific Gas, supra,* 69 Cal.2d at p. 39.) A contract is "integrated" if it constitutes the final expression of the agreement or of a particular subject in the agreement. (See *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391; see also *Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1364.) Contractual ambiguity arises when the contract's language is reasonably susceptible of more than one application to material facts. (See *Dore, supra,* at p. 391; *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1986) 177 Cal.App.3d 855, 859, fn. 1.) However, "extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written [integrated] contract," but only to interpret ambiguous terms in the contract. (*Pacific Gas,* at p. 39.)

We conclude that the trial court did not abuse its discretion in refusing to admit the parol evidence. Exhibits V, V-1, V-2, and V-3 were individually integrated. Indeed, each had its own integration clause. Moreover, the language in each of the agreements is clear and unambiguous, and the court was under no obligation to admit parol evidence that conflicted with the express terms of these agreements or otherwise added to or varied

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in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud."

the terms of a written agreement. (Civ. Code, § 1638; *Pacific Gas, supra*, 69 Cal.2d at p. 39.)

Guillon asserted that the Guillons had a right to become an FBO if WestAir defaulted or terminated its lease under exhibit V-3 that extended until the end of the Guillons' lease term in 2038. Yet, nothing in the language of the agreements so states. Indeed, inconsistent with his position, Guillon asserts in his declaration that he and the City "intended [the Guillons'] security to survive *until the City exercised its option* or until the end of the lease term [exhibit V] arrived in 2038." (Italics added.) Guillon's assertion in summary of his declaration that "the City committed to require any approved FBO to lease the building during the term of our agreement" (see fn.11, *ante*) is likewise not set forth in any of the agreements. Guillon's premise underlying his security assertion and his purported right to use the 3.52-acre ramp leased to Northridge is grounded on his claim the City restricted use of his building exclusively to the FBO function. No such language appears in exhibit V or in any of the agreements as they relate to Guillon. To the contrary, exhibit V expressly lists a variety of non-FBO functions that Guillon could perform in the building. Ramp space is not required for each of these individual functions that could be performed as a "Specialty Aeronautical Operator." (See fn. 4, *ante*, and Standards, § II(F).) Indeed, as of the time the Jays submitted their application to become an FBO, they were using the building to operate Dan Jay Aircraft Sales, Inc., which provides "aircraft sales, consulting and management services." Aircraft sales is one of the approved specialty aeronautical functions. (See fn.4, *ante*.)

Additionally, Guillon asserted that in the event no FBO was interested in leasing his building, he had the right to assume the FBO function. (See fn. 11, *ante*.) Yet, again, no such language appears in any of the agreements. And importantly, nothing in the language of these agreements indicates that any right the Guillons had to become an FBO was unconditional or that they did not have to comply with the Standards. Further,

exhibit V-2, the agreement leasing the hangar and 3.52-acre ramp area to WestAir "for the purpose of engaging in the business of a fixed base operator," does not purport to give any rights to the Guillons to use WestAir's leasehold, much less the Jays. As noted, Guillon was not even a signatory to that agreement. Yet Guillon asserts that the Guillons had a contractual right to "use the traditional and most competitively situated facilities, the FBO property (the WWII hangar, the Apron adjacent to BLDG 1329-1, the fuel storage facilities) used by WestAir."

There is no ambiguity in the language of the contracts insofar as the contractual language is not "reasonably susceptible" to the meaning the Jays wish to ascribe. (Cf. *Dore, supra*, 39 Cal.4th at p. 391.) The assertions in Guillon's declaration add to, and varied the express terms of the 1988 agreements and are therefore inadmissible. (Cf. *Pacific Gas, supra*, 69 Cal.2d at p. 39.)

B. Summary Judgment Ruling

1. Summary Judgment Principles and the Elements of Intentional Interference with a Contract

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; see also Code Civ. Proc., § 437c, subd. (c).) If a defendant shows that one or more elements of a cause of action cannot be established or that there is a complete defense to that cause of action, the burden shifts to the plaintiff to show that a triable issue exists as to one or more material facts. (*Doe v. California Lutheran High School Assn.* (2009) 170 Cal.App.4th 828, 834, citing *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) If the trial court finds that no triable issue of fact exists, it then has the duty to determine the issue of law. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22.) On appeal, we review the trial court's decision de novo. (*Merrill*, at p. 476.) We view the evidence in the light

most favorable to the Jays as the losing party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769.)

To prove intentional interference with a contractual relationship, a plaintiff must establish the following: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach of disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) Based on our de novo review, we conclude that the Jays have failed to establish a triable issue of fact on the first, third, and fourth elements.

2. Valid Contract—Application of Civil Code section 1642

The Jays' theory is that the 1988 agreements involving Guillon tied the FBO function to Guillon's building. Further, the Jays assert that the 1988 agreements were one contract, so that their contract, exhibit W, assigned all the rights under all of the 1988 agreements.

Civil Code section 1642 provides that "[s]everal contracts relating to *the same matters*, between *the same parties*, and made as parts of substantially one transaction, are to be taken together." (Italics added.)[17] Here, the trial court ruled that the assignment to the Jays, exhibit W, referenced only the single contract that was assigned, exhibit V. The court further ruled that the other 1988 contracts "do not fall under C.C.P. [section] 1642 because the contracts involved different parties, different subject matters and were differently termed agreements for different purposes." "The applicability of . . . section 1642 is a question of fact for the trial court, and the appellate court will affirm the court's

[17] Undesignated statutory references are to the Civil Code in effect at the time of the relevant events.

resolution if it is supported by substantial evidence." (*Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 815 (*Versaci*).)[18]

The Jays rely extensively on Guillon's declaration to support their argument that the 1988 contracts should be "taken together" under section 1642 in order to demonstrate that exhibit W assigned the Jays rights under the other 1988 contracts in addition to the rights under exhibit V. We have already determined that the Jays failed to demonstrate that the trial court erred in excluding Guillon's declaration for reasons of lack of personal knowledge, hearsay and inadmissible legal opinion and conclusion. Without Guillon's declaration, there is no admissible evidence showing that the 1988 contracts were to be "taken together" within the meaning of section 1642.[19]

Moreover, the parties in each of the agreements were not the same and each of the agreements involved different matters. Exhibit V concerned the construction of the building and lease of the ground to Guillon and related terms. As noted, it did not limit Guillon's use of the building to FBO functions. (See fn. 4, *ante*.) Exhibit V-1 was a sublease between Guillon and WestAir and specifically limited WestAir's use of the property to FBO functions. Exhibit V-2 was an agreement between the City and WestAir related to WestAir performing FBO functions and leasing the separate 3.52-acre ramp space to WestAir. Guillon was not a party to this contract. Exhibit V-3 was a lease

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[18] In their reply brief, the Jays argue that the question of fact is one for the jury. They cite the several CACI instructions related to factual questions for juries to decide and argue, "these instructions would be violated if a trial judge on summary judgment resolved disputed fact questions." Ironically, they do not list an instruction for a section 1642 determination by the jury. The reason for their failure to do so is because there is none. And the reason that there is none is obvious; it is a question for the court to decide.

[19] We are aware that the use of extrinsic evidence to show whether several written instruments were intended to constitute a single contract does not violate the parol evidence rule (*Versaci*, *supra*, 127 Cal.App.4th at p. 815), but this does not relieve a party of establishing admissibility under the other applicable rules of evidence.

assumption agreement between the City and the Guillons as the parties. WestAir signed not as a party, but as indicating consent of the lease assumption between the City and Guillon.

Further, the Jays' argument that exhibit W implicitly assigned various rights under all the 1988 contracts conflicts with the express language in exhibit W, because exhibit W only references exhibit V. Exhibit W does not specifically reference any assignment or assumption of rights under exhibits V-1, V-2, or V-3. Moreover, it does not limit the Jays' use of the building to FBO functions. Additionally, exhibit W does not purport to give the Jays any interest in the adjacent 3.52-acre ramp area.

Thus, the trial court's ruling that the contracts should not be taken together under section 1642 is supported by substantial evidence.

3. Breach

The trial court ruled that the Jays "were unable to establish any admissible, evidence demonstrating a triable issue of material fact that they were parties to a contract allegedly breached by the City of Chico or that [the Rocks] intentionally attempted to induce the City to breach any contract."

On appeal, the Jays advance a new theory about how the City breached the contract and the inducement. In opposition to the motion for summary judgment in the trial court, the Jays contended that the City's breach "was accomplished through . . . Exhibit X," which "convey[ed] the exclusive right to Apron access" to the Rocks. However, now on appeal the Jays assert the breach resulted when the Rocks influenced Burkland to influence the Council to deny Jays application to be an FBO.

In order to demonstrate a breach under either of these theories, the Jays would have to demonstrate that the contracts, collectively, provided them the right to use the 3.52-acre ramp space or that they were automatically entitled to approval of their FBO application. Over the years, the City leased the ramp space directly to various FBOs at the airport, including WestAir, Redding Aero, and the Rocks, but never to the Guillons or

the Jays. Neither the Guillons nor the Jays ever had a contractual right to use the ramp space. Consequently, it was not possible for the City to breach a contract with the Jays by leasing the ramp space to the Rocks.

The Jays' argument on appeal that the Council breached a contract by voting to disapprove their FBO application also fails. None of the agreements at issue provide the Guillons or the Jays an *unconditional* right to become an FBO for the airport. Moreover, even if the Jays were correct that they were assigned the Guillons' right to become an FBO under exhibit V-3, they would still be required to meet the City's minimum Standards. Here, the Council voted to accept Burkland's recommendation which indicated the Jays had not demonstrated operational capacity and financial stability. Notably, the City did not preclude the Jays from filing another application. Rather than amending and resubmitting their application to correct the deficiencies discussed in the Council hearing, the Jays filed this lawsuit and prosecuted this appeal. As the trial court observed, a second, "more comprehensive application," by the Jays "might be met with approval," and thus the Council has not deprived the Jays of the benefits of their contracts.

Because the Jays failed to show that there is a material dispute of fact on the element of breach, summary judgment was properly granted.

4. Intentional Inducement

On appeal, the Jays assert that the following establishes the intentional inducement element of their intentional interference with a contractual relationship cause of action: "Maria Rock asked Burkland to protect Northgate's exclusive status, even though federal law bars the City from conferring exclusive status on Northgate[;] [¶] The Rocks used cones and crime scene tape to prevent the Jays from using the 3.52 acres that had always been used by the businesses in the Jays' building[;] [¶] A trier of fact could infer that Alicia Rock, formerly responsible for the City's aviation legal issues, influenced Burkland to oppose the Jays' application and thereby breach the 1988 agreements[;] [¶]

The Rocks induced Burkland to require a prospective competitor to make a showing of economic 'need' for additional FBO services." We shall take these theories up in a slightly different order than argued by the Jays.

a. Cordoning Off of 3.52 Acres

The Jays assert in their opening brief that "[t]he Rocks used cones and crime scene tape to prevent the Jays from using the 3.52 acres that had always been used by the businesses in the Jays' building." The Jays have not bothered to cite to a page in the record where this allegation can be found. In any event, even assuming this allegation is in their separate statement, it is does not matter. They have not established a triable issue of fact that the Jays, who had the lease for the ramp space, were not entitled to cordon it off.

b. Maria Rock's Communication with Burkland

The Jays rely on a March 27, 2007, e-mail from Maria Rock to Burkland to establish intentional inducement. The e-mail predates exhibit X, the lease the Rocks signed on July 20, 2007. The e-mail plainly relates to the terms of the lease between the Rocks and the City that was eventually agreed upon.

The e-mail reads: "There is one aspect of the lease issue which is of great concern that I want to address prior to going to the Airport Commission and the . . . Council on April 2, 2007: page 10 of 24[20] a fixed base operator shall not be exclusive . . . . This has been an ongoing discussion. We will lose if the City of Chico allows a second FBO as we are not a large metropolitan area with population to support this requirement. Both

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20 The Jays quotation in their briefing does not include the entire substance of the e-mail. For example, the reference to page 10 of 24 was omitted and substituted with ellipses in the Jays briefing. This reference is critical as it appears to pertain to the non-exclusivity clause on page 10 of exhibit X. The portion of the e-mail questioning the need for the non-exclusivity clause in the Rocks' lease is also not included in the Jays briefing. By these omissions, the Jays attempt to argue that the expression of "great concern" was a request that Burkland "protect them from competition" by harming the Jays.

operations would languish which would be of no benefit to the City. [¶] . . . [¶] Why would the City require us or any FBO owner to sign away our business that requires great diligence to bring back from the ashes?" The e-mail goes on to assert that FBO businesses are "high risk" and "high cost" and "what makes an operation of this nature work requires volume." The e-mail further stated a reminder, "Chico has to see the fact that 3 previous FBO's have not succeeded."

This communication does not establish *intentional* inducement to breach the Jays' contract with the City of Chico, exhibits W and V. It is negotiation by Maria Rock related to *her own contract* with the City. Further, the discussion is consistent with her right to petition government. The e-mail does not establish a material issue of fact on the intentional inducement element by itself or in combination with the three other matters the Jays rely upon in their appellate briefing.

c. Economic Need Showing

Based apparently on Maria Rock's March 27, 2007, e-mail pertaining to the Rocks' own prospective contract, the Jays claim that the Rocks induced Burkland to require *prospective competitors to make a showing of economic 'need'* "for additional FBO services." (Italics added.) The Jays' claim is based on Burkland's cover letter sent to the Rocks along with a fully executed copy of exhibit X. In the letter, Burkland addressed several unrelated concerns the Rocks had expressed. Regarding the exclusivity prohibition, Burkland wrote: "In regard to Section 11, any request from an individual or company to provide FBO services at the airport *would have to be evaluated to determine the need* for any additional FBO service before the City would consider entering into a lease with a new vender. As we discussed, the 'nonexclusive' language is a requirement of the FAA, and must be included in all leases." (Italics added.)

Apart from misleadingly indicating in their briefing that Burkland's letter states the City would require prospective FBOs to *make a showing* of economic need, as opposed to the City *evaluating* such a need as a consideration, there is no evidence that

the Rocks induced Burkland to impose any such requirement on a potential competitor. Moreover, the Jays have not established in their appeal to this summary judgment ruling why such a consideration would not be valid.

Burkland's statement does not establish a material issue of fact on the intentional inducement element by itself or in combination with the three other matters the Jays rely upon in their appellate briefing.

d. Alicia Rock

The Jays assert two pieces of evidence to support their new argument that Alicia Rock intentionally induced a breach of contract. First, they claim that her work at the city attorney's office in October 2000 reviewing the various 1988 agreements at issue put her on notice of the Jays' rights and thereby put the Rocks on notice of the Jays' rights. Notably, Ms. Rock's review of the 1988 agreements took place in 2000, about five years *before* either the Jays or the Rocks became involved with FBO operations at the airport in 2005. Second, the Jays point to a declaration from Airport Commissioner Michael Moran, which the Jays assert stated: "Through 2005, (April 15, 2005), the Rock's [*sic*] daughter, Alicia Rock, was the attorney in the City Attorney's office responsible for matters involved in the FBO function and the FBO property." Based solely on this evidence, the Jays infer that the Rocks used their daughter to influence Burkland to induce the Council to breach the City's contractual relationship with the Jays by voting to deny the Jays' FBO application.

We conclude that this evidence falls far short of establishing a triable issue of fact that Alicia Rock had the influence the Jays argue she had or that she did anything to influence Burkland or the Council. The Jays presented no evidence that she ever talked to or communicated with Burkland about the Jays' application, much less had any such communications with the Council.

5. Ruling on Summary Judgment Motion—Conclusion

Because the Jays failed to show that there is a material dispute of fact on three of the required elements for their intentional interference with a contract claim, summary judgment was properly granted.

II. *Jay v. the City of Chico*, No. C071967

In their writ petition, the Jays challenge the City's denial of their FBO application. They also contend the Rocks' July 20, 2007, contract with the City is void because the Rocks were not required to demonstrate compliance with the Standards and because the contract was the product of a conflict of interest.

A. Additional Background

1. The Jays' Application to be an FBO

On February 26, 2008, the Jays submitted their application, consisting of five pages, to operate a second FBO at the airport out of their building. Jay addressed several matters in the application, including ramp space and petroleum sales. He did not assert that he had a contractual right to be an FBO or a right to the 3.52-acre ramp space under the 1988 contracts.

Regarding ramp space for aircraft tie-down and charter services, Jay wrote: "We anticipate satisfactory resolve to [*sic*] the current unacceptable ramp-side lease situation. However, as *an interim measure*, a *temporary arrangement* has been made with Aero Union to utilize a portion of 3.8 acres of ramp space necessary for transient tie-down and the operation of aircraft associated with flight training and air charter services. We may seek additional lease ramp space on the airport as the need develops over time." The proposal did not indicate how long Aero Union had committed to this "temporary arrangement." Jay did not describe how this space met the Standards requirement that the ramp space be conveniently located to a waiting room facility or how they intended to move people to and from the ramp space and their building.

Regarding petroleum sales, Jay wrote: "We are already in negotiations with our likely supplier of Avgas and Jet-A fuel. Concurrent with this proposal, we formally request permission to install a storage tank with which we will include a self-serve, 24-hour fueling island for 100LL avgas." Jay described the location at the airport he thought was suitable for the fueling island as an "undeveloped" area "at the far southeast end of the existing main ramp area and taxiway" and stated, "We are prepared to immediately enter into a lease agreement for this property and to begin construction as soon as possible. If airport authorities feel that another location would be more suitable, we would be agreeable to discussing that." Jay did not explain how this undeveloped area at the far southeast end of the existing ramp and taxiway met the Standards requirement for unassigned apron parking and tie-down space for customer storage of aircraft pending fueling. Nor did the application discuss the Standards requirement that an office/waiting facility be "conveniently" located to the fueling area for pilots and their guests to wait during fueling operations.

2. The April 29, 2008, Agenda Report for the Commission Hearing

At the Commission's request, Burkland provided a written report and attached staff analysis. The report included the following recommendation: "The Airport Manager does not recommend approval of the [Jays'] proposal *at this time*." Under the "Fiscal Impact" portion of the report, Burkland wrote: "based on the economic difficulties experienced by previous [FBOs], it would not be *practical*[21] for more than one FBO to provide services at the . . . Airport *at this time*. Due to the volatile nature of the business, the unstable economy, and rising cost of fuel, *at this time* the competition from an additional FBO would not be in the best interests of the airport and would not serve the civil aviation needs of the public. Competition for fuel sales, the major revenue

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21 As we will discuss *post*, practicality is a consideration under the AAIA.

source for any FBO, would not promote business, but would have a devasting effect on the existing FBO *and any other operator allowed to fuel planes*." (Italics added.) The report referenced the attached staff analysis, providing details concerning specific matters in the Jays' application and staff's comments.

Regarding aircraft petroleum products sales, the attached staff analysis noted that Jay proposed the installation of self-serve fueling island for Avgas and that Jet A would be provided through Aero Union according to the application. The analysis went on to state: "The Standards require that at least one acre of unassigned apron parking and tie-down space is available for customer use for storage of aircraft pending fueling. . . . Consideration should be given to the fact that there is also a requirement for a conveniently located office/waiting room facility, and pilots *and their guests would have to walk or be transported from the [proposed fueling area] to the FBO offices*." (Italics added.)

Regarding air charter and aircraft management services, the staff analysis noted that these activities would require adequate apron space be provided for "enplanning and deplanning passengers and storing aircraft." The analysis stated: "Mr. Jay has indicated that he has made arrangements with Aero Union on a *temporary basis* to provide ramp space for aircraft associated with flight training and air charter services." (Italics added.) The analysis further noted that a sublease would be required for this purpose and that additional approval of the sublease by the Commission would also be required.

Regarding aircraft tie-down, the staff analysis again stated: "Mr. Jay has made arrangements with Aero Union to temporarily use ramp space for transient tie-down." It then went on to comment, "*The ramp issue will need to be resolved before this activity can be implemented*." (Italics added.)

Concerning financial stability, the staff analysis stated: "[T]he minimum standards requires that 'Operators shall demonstrate to the satisfaction of the Commission their financial stability and operational capability in connection with the proposed

operations. In this regard, the Commission may consider credit ratings, financial statements, business ratings, references, and such other sources as it deems necessary and appropriate.' *If the proposal is approved, Mr. Jay should provide the City with information on the financial stability of his proposed operations*." (Italics omitted & added.)

The staff analysis discussed the history of financial difficulties past FBO's had experienced at the airport. Letters and commission meeting minutes related to this history were attached to the analysis.

3. The July 29, 2008, Commission Hearing

The hearing began with Burkland explaining that he had had discussions with Jay and the Rocks because he felt and continued to feel that there was a possibility that a complementary, noncompetitive relationship could be worked out between the two. However, after discussions, Burkland concluded there was not a willingness by either party for such a relationship. Consistent with his report and staff analysis discussed *ante*, Burkland recommended that the Jays' application be denied.

During Jay's presentation, he told the Commission, "I think that ultimately there's *a good chance that one operator may prevail over another and make it*." (Italics added.) Regarding ramp area, he acknowledged he and Northgate were not going to be able to arrive at an agreement. He expressed a desire to lease land behind or between the Aero Union building and the southernmost line of Northgate's ramp. Regarding encroachment onto Northgate's ramp area, Jay told the Commission, "In terms of encroachment, it's gonna happen. Northgate would find it necessary at many times to drive their fuel trucks across my ramp, as *I may find it necessary at many times to drive across their ramp*." (Italics added.)

The majority of the discussion by the commissioners related to the FAA prohibition against FBO exclusive rights and the potential for violating grant assurances if the Commission denied the Jays' application. The chair based his vote to approve on

this concern. Another commissioner cited the FAA guidance on the exclusivity prohibition as a reason for approval in addition to his belief that competition would be healthy. Another commissioner voted to approve because business people should have the "freedom" to make business decisions "without interference from other people who think that they can predict the future." The sole commissioner who voted to reject the application did so on the ground that there was not a need for a second FBO providing fuel and that given the 2008 economy, it was not the time to establish a second FBO, although the situation might be different in a "better economy."

None of the commissioners said anything about whether Jay had actually met the minimum standards. Concerning the minimum standards, the Commission chair acknowledged during the hearing that, "[c]learly, *during the process* the applicant would have to meet those minimum standards." (Italics added.) Later, just before taking the vote to approve the application, the chair asked Burkland, "If this does go forward and get approved, there are still a number of things that have to be done. I mean I know in your report for example, there's some requirements perhaps for environmental impact review and a lot of other things. A lot of details that will have to be sorted out and I'm assuming that that's going to be handled through your office." Burkland replied, "[T]hat's correct. I think it would include operating agreements, lease agreements, environmental review, and then *the financial analysis that's required as part of the minimum standards*." (Italics added.)

4. The September 2, 2008, Agenda Report for the Appeal to the Council

Burkland prepared an agenda report for the hearing before the Council. Jay acknowledges in his reply brief that he received a copy of the report when it posted on

August 29, 2008.[22] He also says he received a copy of the Rocks' notice of appeal at the same time.

Burkland recommend that "the . . . Council uphold the appeal thereby denying the recommendation of the Airport Commission." Burkland attached the staff analysis he had previously attached to the agenda report for the Commission hearing.

In the fiscal impact section of the report, Burkland again stated that it would not be "practical" for more than one FBO to provide services at the airport, citing the same considerations previously set forth in the agenda report for the July 29, 2008, Commission meeting. Burkland went on to write that the Jays had not demonstrated "financial stability and operational capability as required by the City's minimum standards," and opined that the airport could not support two FBOs "*at this time*." (Italics added.)

Regarding the City's financial stability standard, Burkland opined that it was "*not practical* for more than one FBO to provide services at the airport" and "the existence of two FBOs would likely result in the failure of both FBOs which would have a devastating effect on the airport and the civil aviation public." Burkland further wrote, "the volatile nature of the business, the unstable economy and the rising cost of fuel all prevent a second FBO from being financially stable *given current conditions* at the airport." (Italics added.) Additionally, Burkland repeated what he had written in the recommendation to the Commission regarding the highly competitive nature of fuel sales.

Regarding the operational capability standard, Burkland opined that the Jays had not demonstrated their ability to perform the FBO services in compliance with the City's Standards because they did not have adequate apron space to provide the proposed

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[22] We take judicial notice that August 29, 2008, was a Friday and September 2, 2008, was the following Tuesday. (Evid. Code, §§ 452, subd. (h), 459 subd. (a)(2); *Douglas v. Janis* (1974) 43 Cal.App.3d 931, 936.)

aircraft charter or aircraft tie-down services. Burkland stated that while the Jays had been in "discussions with Northgate and Aero Union, the Jays had been unable to secure permanent and adequate ramp space to become operationally capable under the minimum standards."

5. The September 2, 2008, Council Hearing on the Rocks' Appeal

The Council hearing began with an oral report by Burkland. He focused on the issues related to financial stability referenced in his Agenda Report and the Commission's focus at its hearing on the FBO exclusive rights prohibition. Burkland stated that when the matter came before the Commission, he recommended denial of the proposal "because of the history of economic difficulties experienced with previous FBO's and I would believe it would not be *practical* that more than one FBO to provide services at our airport. The most important element of the FBO is fuel sales. Currently, the fuel sales at the Chico Airport by Northgate is about 400,000 gallons per year . . . . I put in a call to . . . Redding Municipal Airport and they currently have one fixed based operation and they sell about 1.3 million gallons a year of fuel, both the aviation gas and Jet A. The Redding Airport staff told me that there were [*sic*] a previously another FBO, . . . but they dropped out because of lack of business."

Mayor Holcome asked the city attorney's office representative for an oral report on the FAA FBO exclusive rights prohibition and what exceptions might apply. The assistant city attorney (ACA) told the council members that he spoke with an FAA compliance officer concerning the FBO exclusive rights prohibition. The ACA explained: "[the compliance officer] informed me the City does in fact have discretion as the airport sponsor and can take into account such factors as traffic at the airport, or the need for services, the impact on the airport . . . those sort of factors. So I do believe the City does [have] discretion whether or not to allow a second FBO." "[I]t is not an exclusive right violation in my opinion when you take into account the factors at the airport. But to say the City will allow only one FBO regardless of circumstances, that

would be a[n] exclusive rights violation." For example, it would be a violation if the City's contract with the FBO stated that the FBO would be the exclusive provider. The compliance officer told the ACA that if the City prevented a second FBO and there was a complaint to the FAA, the FAA could take a look at the situation and consider factors such as existing conditions and the need for a second FBO.

The ACA further advised that while it was permissible to look at the current conditions, the Council could arrive a different conclusion "at a later date" as circumstances change. "But at this point, you look at the factors existing at the airport and make a determination based on the minimum standards, factors, those sorts of things."

When asked by a council member, the ACA quoted an FAA regulation that read, "there will not be an exclusive right if it is *impractical and burdensome and in doing so would require taking away space from an existing FBO*." (Italics added.) The ACA stated that it was his understanding, while that provision defines a circumstance when there is not an exclusive rights violation, reading all the regulations together, the exclusive rights prohibition applies to prevent a city from having a policy of having only one FBO and "just flat out says no" to other proposals, without considering them and taking into consideration any factors.

Councilmember Gruendl noted that the Council need not address the FBO exclusive right issue, "Because we don't have a viable candidate, in which I read this staff report, is that staff indicates that they don't believe applicant meets the minimum standards." The ACA agreed, saying, "Yes, I believe that is the starting point . . . whether or not the applicant meets the minimum of standards."

The Commission chair provided written and oral comments. In his written comments, the chair stated the Commission majority made its decision based on their understanding of guidance provided in FAA written policy concerning the FBO exclusive rights prohibition and grant assurances given the FAA by the City that it would abide by

that prohibition. The chair discussed an exception to the exclusivity prohibition[23] and noted that staff had argued the prong of the exception that says "it would be unreasonably costly, burdensome, or impractical for more than one [FBO] to provide such services" gave the Commission the right to deny based on economic uncertainty and past FBO history at the airport. But the chair noted that the exception has a second prong requiring that allowing more than one FBO would require a reduction of space leased pursuant to an agreement with another FBO. He wrote, "There is nothing in the proposal before the commission 'requiring' the reduction of space leased to Northgate." The chair did not address Jay's comments at the Commission hearing about encroachment of Northgate's ramp space. Importantly, the chair never stated in his memorandum that the Commission majority voted to approve because the Jays met the minimum standards.

While the Commission chair focused his oral comments at the Council hearing on the FAA prohibition against exclusive FBO rights, he acknowledged that Jay had not yet met the minimum standards, but had only agreed to meet them. In this regard, the chair told the Council: "The [C]ommision says we can't deny Mr. Jay's application because he *agrees to meet* our minimum operating standards. . . . To deny the application could result in exclusive rights violations." He explained that the Commission approved Jay's application "pending certain things that he is going to have to do." According to the chair, details concerning the minimum standards would have to be "flushed out and made part of [the] proposal. We probably will see that proposal again at the [C]ommission, or not, depending upon what happens. But if we were to see that proposal again, all of those details would have to be flushed out and *at that point*, Mr. Jay would be held to what he had." (Italics added.) Thereafter, according to the chair, the proposal would then be turned into a contract.

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[23] We discuss this exception in detail, *post*.

Jay made comments to the Council. He began his presentation by asserting that the Council had been "hoodwinked" when it approved Northgate's long-term lease for the ramp space in 2007. He complained that the "FBO building" which he owned was left to stand as an island because the Northgate ramp space is contiguous to that building. He initially asserted the city lease requires that his building be used as an FBO. He also commented that the management of Northgate alienates the flying public "more and more," criticized the Rocks' background and experience and implied that he could provide better service.

At the end of his discussion about his building and his disparagement about the Northgate management, he asked for an extra minute and it was granted. He then for the first time turned to the operating standards, and asserted, "Using the facilities approved and mandated for this use we already meet the necessary minimum operating standards with the exception of fuel service." He acknowledged it would be necessary for him to provide fuel service "to maintain the viability of [his] investment in the FBO building" and explained in general terms how that could be done, stating "[w]e will do this by offering self service low lead as well as truck to plane 100 low lid [*sic*] to jet plane." He did not mention where the fuel he would truck to planes would be stored, where the truck or trucks would be stored, where customers would wait during fuel operations, how those customers would get to the waiting area or any other details regarding the provision of fuel. He went on to spend time offering a rebuttal to the Rocks' allegations that some commissioners had been biased. He then complained about the lack of a fulltime airport manager and how if there had been someone in that position fulltime, the staff analysis concerning the viability of a competitive operator may have been different.

When a council member asked about his plan in the written proposal to provide Jet A fuel through Aero Union, Jay admitted that that plan was no longer "viable" and that that part of the proposal was "inaccurate." He stated, "[t]hat was something that we discussed early in the game. But Aero Union situation is not, does not lend itself at this

point to participate in that. Largely due to their facilities . . . things they would have to do to change their fuel system and they are simply too busy with their new Lockheed Martin contracts and the goings on with Aero Union being much more profitable areas. Uh, so our proposal, that part is actually inaccurate." He said that he now planned to offer both Avgas and Jet A fuel through Sacramento Jet Center, but he provided no specifics.

A council member then asked Jay about his plan in the written proposal to lease ramp space from Aero Union and whether that was "still on the table." Jay only replied that he was now seeking to lease ramp space from the City located between Aero Union and Northgate, which he said would be suitable for "what we need to do." He did not, however, provide an explanation on how that space could accommodate both aircraft tie-down and emplaning and deplaning passengers on charter flights or meet the requirement that it be located conveniently to an office/waiting area.

When the mayor asked the ACA about Jay's assertion that his lease required that he only run FBO operations out of his building, Jay essentially admitted that the lease was not actually limited. He interrupted stating, "We are running general aeronautical services that are covered by my lease." The ACA advised the Council that the lease does restrict the use of the property, but "states a whole host of possible activities."[24] Jay did not dispute this statement.

After the close of the public hearing, council members moved and seconded that the Council "accept the City Manager recommendation of [*sic*] uphold the appeal that by denying the recommendation of the Airport Commission." (Italics added.) During the ensuing discussion, Councilmember Gruendl expressly found "that the proposal did not

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[24] See footnote.4, *ante*.

meet the minimum standards" and that he "could come up with a dozen potential areas where it's not meeting the minimum standards."[25] The motion carried unanimously.

B. Standards of Review for Demurrers

We review the legal sufficiency of a complaint de novo, accepting as true all alleged material facts to determine whether they suffice to constitute a cause of action. (*Mendoza v. JP Morgan Chase Bank, N.S.* (2016) 6 Cal.App.5th 802, 809; *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1608 (*Hamilton*); *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).) "We also consider matters that may be judicially noticed." (*Hamilton*, at p. 1608.) The governing standards of review apply equally whether a demurrer challenges a complaint or a writ petition. (*SJJC Aviation Services, LLC v. City of San Jose* (2017) 12 Cal.App.5th 1043, 1052 (*SJJC*).) "A demurrer may be sustained where judicially noticeable facts render the pleading defective [citation] and allegations in the pleading may be disregarded if they are contrary to facts judicially noticed." (*Integen v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052 (*Integen*), citing *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6, & *Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400.) Additionally, we do not treat as true "contentions, deductions or conclusions of law" in the pleading. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

"We will affirm if there is any ground on which the demurrer can properly be sustained, whether or not the trial court relied on proper grounds or the defendant asserted a proper ground in the trial court proceedings." (*Lewis v. YouTube, LLC* (2015) 244 Cal.App.4th 118, 121 (*Lewis*); *Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031 (*Martin*); see also *Integen, supra*, 214 Cal.App.4th at p. 1052; *Scott v. JP Morgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752 (*Scott*).)

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[25] We discuss Councilmember Gruendl's comments in more detail, *post*.

"On appeal, '[w]e do not review the trial court's reasoning, but rather its ruling.' [Citation.] Thus, we may affirm the trial court's ruling 'on any basis presented by the record whether or not relied upon by the trial court.' " (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 802 (*McClain*) [affirming trial court's ruling sustaining a demurrer].)

The Jays bear the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*Blank*, *supra*, 39 Cal.3d at p. 318.) "While such a showing can be made for the first time to the reviewing court [citation], it must be made." (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711 (*Smith*).) To satisfy their burden on appeal, a plaintiff " 'must show in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of his pleading.' " (*Hacker v. Homeward Residential, Inc.* (2018) 26 Cal.App.5th 270, 276-277.)

However, rules of appellate practice are also at play. New issues cannot be raised for the first time in oral argument. (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1098 (*New Plumbing*) [leave to amend raised for the first time at oral argument rejected; "new issues cannot generally be raised for the first time in oral argument"].) Indeed, we do not even consider arguments made for the first time even in a reply brief, because " '[o]bvious considerations of fairness in argument demand that *the appellant present all of his [or her] points in the opening brief.* To withhold a point until the closing brief would deprive the respondent of his [or her] opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' " (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 (*Reichardt*), quoting *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 (*Neighbours*), italics added.) Thus, where a petitioner fails to show how their petition can be amended in their

opening brief, we may properly regard any belated proposed amendments as forfeited. (*Allen v. City of Sacramento*, (2015) 234 Cal.App.4th 41 (*Allen*) [rejecting points raised for the first time on appeal without good cause in reviewing trial court's ruling sustaining a demurrer without leave to amend].)

C. The Council's Jurisdiction to Hear the Rocks' Appeal

1. Additional Background and the Jays' Contentions

The Jays contend that the Council lacked jurisdiction to hear an appeal from the decision of the Commission because the City of Chico Municipal Code section 2.80.050(B) (section 2.80.050(B) conflicts with the City Charter. Section 2.80.050(B) expressly authorizes the Council to hear appeals from decisions of the Commission.[26]

The Jays argue that nothing in the plain language of the City Charter expressly authorizes the Council to revoke the specific grant of authority to the Commission contained in section 1007.1 of the City Charter, "which a power to review patently does." For the first time, the Jays now additionally contend that the Commission's own FBO

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[26] Section 2.80.050 provides in pertinent part as follows: "Except as otherwise provided by this code, an appeal of the following decisions and determinations of a city board or commission shall be made to the city council in the manner hereinafter provided by this chapter *by any person who is aggrieved* by the decision, or by the city manager where the city manager determines that such decision may be contrary to the policies of the city council: [¶] . . . [¶] B. *A final decision of the airport commission on a lease, license, permit or other entitlement which authorizes or would authorize the use of public or private property located at the Chico Municipal Airport* or within the boundaries of the Chico Municipal Airport Industrial Park, including, but not limited to, a final decision of the airport commission when acting in the capacity of either the planning commission or the architectural review board on a use permit, variance or other entitlement which authorizes or would authorize the development or use of property located at the Chico Municipal Airport or within the boundaries of the Chico Municipal Airport Industrial Park. . . .."
(<http://library.amlegal.com/nxt/gateway.dll/California/chico_ca/chicomunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:chico_ca> [as of May 28, 2019], archived at <http://perma.cc/N5H2-L7R7>.)

standards, which purportedly reserves to the Commission the exclusive jurisdiction to decide whether an FBO application satisfies the standard, limits the Council's authority to review the Commission's decisions. They also argue that the Council lacked jurisdiction to deny the Jays' application based on "non-Standards grounds" such as the " 'the economic reality of FBO operations at the airport.' " Finally, the Jays assert that even if the ordinance vests the Council with the general power to hear an appeal from the Commission's decision, the Council lacked jurisdiction to consider this particular appeal because as competitors, the Rocks lacked standing to appeal the Commission's decision on the Jays' FBO application.

We disagree with all of the Jays' contentions.

2. Analysis

a. Purported Conflict between the Charter and CMC

The facial validity of a municipal ordinance is a matter of law for our independent review. (*Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 381.) We seek to give full effect to the intent of the legislative body enacting the ordinance. (*Teachers Management & Inv. Corp. v. City of Santa Cruz* (1976) 64 Cal.App.3d 438, 446.) "It is a prime rule of construction that the legislative intent underlying a statute must be ascertained from its language; if the language is clear there can be no room for interpretation, and effect must be given to the plain meaning of the language." (*Livingston v. Heydon* (1972) 27 Cal.App.3d 672, 677.)

In construing city charters, it must be noted that "the city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter." (*City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, 598.) "Charter provisions are construed in favor of the exercise of the power over municipal affairs *and 'against the existence of any limitation or restriction thereon which is not expressly stated in the charter*." (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171 (*Domar Electric*), italics

added.) Additionally, we note that section 201 of the Charter states: "The city shall have the power to make and enforce all laws and regulations in respect to municipal affairs, subject only to such restrictions and limitations as may be provided in the Constitution of the State of California, or provision of this Charter. The enumeration in this Charter of any particular power shall not be held to be exclusive of, or any limitation upon, any general power of the city."

In advancing their claim that the City had no jurisdiction to review and reverse a decision made by the Commission, the Jays rely on section 1007.1 of the Charter, which states in pertinent part: "The airport commission shall have the following powers and duties. [¶] A. The power and duty to operate and maintain all airports and airport properties belonging to or under the control of the city and to adopt such rules and regulation as may be necessary to govern the use of such airports and airport properties. [¶] B. The power to enter into leases and contracts in connection with the operation of all airports and airport properties belonging to or under the control of the city . . . ." However, section 1000 of the Charter states: "There shall exist within the city each of the boards and commissions provided for by this article [Article X, Appointive Boards and Commissions] . . . . Each such board and commission shall have the powers and duties provided for in this Charter and/or established by ordinance or resolution of the council; provided, however, that *no power granted to a board or commission herein shall be deemed to be equal to or greater than that of the council*." (Italics added.)

As noted, section 2.80.050 of the Municipal Code, enacted by the City in 2004, authorizes the Council to review an appeal of any "final decision by the airport commission on a lease, license, permit or other entitlement which authorizes or would authorize the use of public or private property located at the Chico Municipal Airport or within the boundaries of the Chico Municipal Airport Industrial Park." (See fn. 27, *ante*.)

Here, the plain language of the City Charter authorizes the power to hear appeals as provided in the ordinance. Section 1000 unambiguously states that the Council "shall

have the powers and duties provided for in this Charter *and/or established by ordinance*." It further provides that "no power granted to a board or commission herein shall be deemed to be equal to or greater than that of the council." And section 201 of the Charter provides that, "[t]he enumeration in this Charter of any particular power shall not be held to be exclusive of, or any limitation upon, any general power of the city." On its face, the Charter thus authorizes the Council to exercise authority over the city's commissions and boards. Moreover, nothing in the Charter expressly precluded the Council from enacting the provisions of section 2.80.050. (See generally, *Domar Electric, supra*, 9 Cal.4th at p. 971.) We agree with the trial court's conclusion that "subject to the *express* terms of the Charter, the Council is provided with near plenary power over City commissions and boards."[27] The Commission cannot have greater power regarding FBO applications than the Council. Indeed, the Commission chair understood that the Commission's decision could be appealed to the Council. During the Council hearing on the Jays' application, the chair expressly acknowledged that "anything we do here can also be subject to review by the Council."

Accordingly, we reject the Jays' arguments that the ordinance authorizing the Council to review an appeal of their FBO application from the Airport Commission is in conflict with the Charter and therefore invalid.

b. Purported Limitation on Council Authority Imposed by Commission Regulations

Further, we reject the Jays' newly minted argument that the Council's power is limited by the Commission's own FBO standards. While the Charter gives the

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[27] Because the express terms are unambiguous, we need not address the Jays' contention that purported legislative history in the form of a memo from a city attorney in 1961 when the Charter provisions were being considered suggests the drafters of the Charter considered and rejected a Charter provision allowing appeals from the decision of any commission.

Commission the authority to adopt "such rules and regulations as it may be necessary to govern the use of [the] airport[] and airport property," nothing in the Charter purports to grant the Commission the power to limit the Council's powers. Indeed, such an interpretation would conflict with the express language of Charter sections 201 and 1000. The FBO standards simply cannot, as the Jays contend, limit the Council's jurisdiction. Moreover, the Jays' reading of the Charter would be inconsistent with the Commission chair's understanding that anything the Commission might do on the Jays' application "can also be subject to review by the Council."

Accordingly, we reject the Jays' arguments that the ordinance authorizing the Council to review an appeal of a Commission decision and the enabling provisions of the Charter are trumped by Commission regulations.

c. The Rocks' Standing

The Jays recognize they failed to argue the Rocks' lack of standing before the Council, but argue now on appeal that lack of standing is a jurisdictional defect that can be raised at any time. They rely on *Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 500-501, a civil case that stands for the proposition that lack of standing to sue on a civil claim is a defect affecting the jurisdiction of the court. As the court in *Cummings* noted, the lack of standing negates the existence of a cause of action. (*Id*. at p. 501.) The Jays cite no authority that says the same rule applies to the jurisdiction of a city council to hear an appeal from a commission.

Even if the argument is not forfeited, CMC section 2.80.050(A) provides that "any person who is *aggrieved* by the decision" of a commission has a right of appeal. (Italics added.) Section 2.80.040 provides that "a person shall be deemed aggrieved by a decision, determination or order made or issued by a city board, commission, officer or employee in the event the decision, determination or order *has a significantly greater effect on such person than the public in general*." (Italics added.) The Jays cite no California authority supporting their argument that a business competitor is de facto

precluded from challenging decision of a commission before a city council. Aside from the potential pecuniary losses upon which the Rocks focused and the bias in the Commission's decision they alleged, they may also be aggrieved by the impact that approving the Jays request would have on their leasehold of the 3.52-acre ramp area. As noted, Jay told the Commission, "In terms of cross encroachment, it's gonna happen. Northgate would find it necessary at many times to drive their fuel trucks across my ramp, as *I may find it necessary at many times to drive across their ramp*." (Italics added.)

In their original briefing, the Jays rely on a 2004 treatis for the proposition as stated by them that a business competitor of a permittee is not an aggrieved party. (8A McQuillin, Mun. Corp. (3rd ed. 2004), § 25.258.) However a more up-to-date version of the treatis states: A business competitor is not, by reason of that status alone, an aggrieved person. (8 McQuillin, Mun. Corp. § 25:354 (3d ed. 2018 update).)

The Jays also relied on a New Jersey superior court case for the proposition that a business competitor does not have the right to appear before a municipal agency to challenge a land use application by an entity engaged in the same business when, other than to increase competition, the municipal action would have no impact upon the present or prospective property rights of the party seeking to appeal.[28] (*Paramus Multiplex Corp. v. Hartz Mountain Industries* (1987) 236 N.J. Super. 104 (*Paramus Multiplex*).) That case involved the interpretation of a New Jersey statute providing that an "interested party" had the right to appear in front of the municipal agency and the right to cross-

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[28] In New Jersey, the superior court is a trial court. (See New Jersey Courts, About New Jersey Courts, at <https://www.njcourts.gov/public/overview.html?lang=eng> [as of Jan. 28, 2019].)

examine during the agency proceeding.[29] (*Id*. at p. 109.) The plaintiff and defendant/applicant were competing movie theater companies. (*Id*. at p. 108.) Neither had an existing contract with the municipality.

Here, we do not address a statute defining "interested parties" as defined in the New Jersey statute. Further *Paramus Multiplex* has no application where an FBO with whom the City has contracted, seeks to appeal a decision allowing another entity to establish an FBO and such decision could impact airport operations, the operations of an established FBO, or the leasehold interest of an established FBO. In our view, the Rocks were "aggrieved by the decision" within the meaning of section 2.80.050(A), and the Jays have shown no California authority to the contrary. Moreover, given the impact on the airport discussed in both agenda reports, the exception mentioned in *Paramus Multiplex* providing standing where there is a slight private interest combined with substantial public interest would apply to confer standing to the Rocks, even under the New Jersey authority. (*Paramus Multiplex, supra,* 236 N.J. Super. at p. 108.)

In a Hail Mary attempt to score on their standing claim, the Jays cite and rely on *SJJC, supra*, 12 Cal.App.5th 1043, in supplemental briefing we granted leave to file. The Jays argue "*SJJC* and this case are near perfect fits." They are not. *SJJC* did not involve standing to appear before a municipal agency on an appeal from a commission and no city municipal code provision identifying persons who have standing was in play. *SJJC* involved standing to seek a writ of mandate in superior court under section 1086. Section 1086 requires a party seeking a writ of mandate be "beneficially interested."

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[29] The applicable New Jersey statute defined " '[i]nterested party' " to mean "in an administrative proceeding before a municipal agency, any person, whether residing within or without the municipality, *whose right to use, acquire or enjoy property is or may be affected by any action taken under this act*." (*Paramus Multiplex, supra*, 236 N.J. at p. 109, italics added.)

Specifically, section 1086 provides in pertinent part that a writ of mandate "must be issued upon the verified petition of the party beneficially interested."

In *SJJC*, a competitor FBO filed a petition for writ of mandate seeking to overturn a city's decision to award a lease and operating agreement to real party in interest. (*SJJC, supra,* 12 Cal.App.5th at pp. 1045-1046.) When the City sought to add a second FBO on the west side of the Norman Y. Mineta San Jose International Airport, SJJC submitted a bid, but the city rejected it in favor of the bid submitted by real party. (*Id*. at p. 1046.) SJJC contended that the city's bidding process was flawed because it favored real party and overlooked deficiencies in real party's proposal. (*Id*. at p. 1050.) SJJC filed a writ petition seeking an order rescinding the award and to reissue the RFP. (*Id*. at pp. 1046, 1049-1050.) SJJC alleged in its petition that both it and the public would be " 'irreparably harmed' " if the court did not require the city to set aside its prior approval and rebid the project in compliance with law. (*Id*. at p. 1050.)

On appeal from the trial court sustaining the city's demurrer, the appellate court held that SJJC did not have standing to seek the writ in superior court under section 1086. The court observed that " '[t]he requirement that a petitioner be " 'beneficially interested' " has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' " [Citation.] " 'The beneficial interest must be direct and substantial.' " [Citation.] This standard " 'is equivalent to the federal " 'injury in fact' " test, which requires a party to prove by a preponderance of the evidence that it has suffered ' "an invasion of a legally protected interest that is " '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." ' [Citation.] A petitioner has no beneficial interest within the meaning of the statute if he or she " 'will gain no direct benefit from [the writ's] issuance and suffer no direct detriment if it is denied.' " (*SJJC, supra*, 12 Cal.App.5th at p. 1053.)

The court rejected SJJC's assertion that it was beneficially interested because the city had rejected its proposal for the reason that SJJC did not include nine of the required items listed in the RFP. (*SJJC, supra*, 12 Cal.App.5th at p. 1054.) The item which the city allegedly relaxed for real party had no effect on SJJC because its bid was nonresponsive to the nine items it failed to address. (*Id*. at pp. 1054-1055.) Based on this, the court concluded SJJC did not suffer prejudice from the asserted irregularity in the bidding process. (*Id*. at p. 1055.) And it expressly noted that SJJC did not explain how it was harmed by the process leading to the City's decision. The court concluded it was not beneficially interested by the decision. (*Id*. at p. 1056.)

Here, we address standing to appear before the Council, not standing to file a writ petition in superior court. Thus, section 1086 and its judicial interpretations has no application. We look not to whether persons seeking an appeal before the Council had a beneficial interest under section 1086 and the decisional law interpreting that term. We look to the CMC to identify persons who have standing. As we have noted, CMC section 2.80.050(A) provides standing to "any person who is *aggrieved* by the decision" and section 2.80.040 defines such persons as anyone for whom the decision has "a significantly greater effect on such person than the public in general." (Italics added.) Moreover, although we need not import the idea that the interest must be "substantial" or the Rocks must have suffered "injury in fact" from the section 1086 cases, we note that even if the beneficial interest standard and its judicial gloss were to apply, the Rocks would have standing because the decision of the Commission affected not just their operations as a competitor, but also impacted their leasehold interest in the 3.52-acre ramp space they leased from the City on which Jay told the Commission there would be "encroachment" by his operations if his application were granted.[30]

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[30] At oral argument, counsel for the Jays argued that the Rocks never mentioned the ramp encroachment as an injury when they filed their notice of appeal. But unlike the

The City had argued in its original briefing in response to the Jays' reliance on the New Jersey case that under that state's law, a public interest exception would apply. In their supplemental briefing, The Jays rely on *SJJC, supra,* 12 Cal.App.5th at page 1057, in an effort to establish that California's public interest exception does not apply. We disagree.

Citizens for Amending Proposition L v. City of Pomona (2018) 28 Cal.App.5th 1159 (*Citizens*), a case not cited by the Jays in their supplemental briefing, provides a concise exposition of the law concerning the public interest exception. As the *Citizens* court noted, " ' "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." ' [Citation.] This ' "public right/public duty" exception to the requirement of a beneficial interest for a writ of mandate' 'promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.' [Citations.] . . . [¶] '[T]he interest of a citizen may be considered sufficient when the public duty is sharp and the public need weighty.' " (*Citizens,* at pp. 1173-1174.) This test involves judicial balancing of the interests. (*Id*. at p. 1174.) "The balancing is done on a sliding scale: 'When the public need is less pointed, the courts hold the petitioner to a sharper showing of personal need.' " (*Ibid*.) And even if the petitioner is a competitor, "neutrality is not 'a necessary prerequisite for public interest standing.' [Citation.] '[I]ndeed, truly neutral parties are unlikely to bring citizen suits.' [Citation.]

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judicial gloss placed upon section 1086 when a party seeks a writ petition in superior court that requires a plaintiff to prove injury in fact by a preponderance of the evidence, there is no requirement in CMC 2.80.040 for a party appealing to the Council to prove injury in fact by a preponderance of the evidence. Additionally, because the Jays never objected on standing grounds, there was no reason for the Rocks to assert injury related to the Jays' use of the ramp space the Rocks were leasing.

Instead, a personal objective is one factor the court may consider when weighing the propriety of public interest standing." (*Id*. at pp. 1176-1177.)

If the same public interest exception courts apply in the section 1086 context is applicable to a party appealing a decision of commission to a city council, it would apply here given the potential impact of granting the Jays application on the airport and airport users and their rights and the Rocks' reference in their notice of appeal to the staff report discussing these potential impacts. Under the circumstances, the duty of the City concerning airport operations is sharp and the public need here is weighty.

We reject the Jays' meritless argument that the Rocks lacked standing.

D. Substantial Evidence/Findings

1. Substantial Evidence

The Jays alleged in their petition that the Council's decision to deny their FBO application was not supported by findings and substantial evidence. Based on the allegations in the pleadings and matters to which we may take judicial notice, we conclude that the Jays have failed to state this claim.

The Council's quasi-judicial decision is reviewed by administrative mandate. (Code Civ. Proc., § 1094.5; *Cal. Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1482-1483.) A court may issue a writ of administrative mandate when the agency has abused its discretion. (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 305.) Abuse of discretion in this context is established if the agency decision is not supported by findings or the findings are not supported by substantial evidence. (*Ibid*.) Thus, we must determine whether there is substantial evidence from the face of the petition and matters that are subject to judicial notice. We may take judicial notice of the testimony heard by the Council because the Council was entitled to rely on that testimony (*Lindborg-Dahl*, *supra*, 179 Cal.App.3d at p. 962) and because we may take judicial notice of this information for the non-hearsay purpose of determining the information upon which the decision was made. (See *People v. Woodell* (1998) 17

Cal.4th 448, 459 [judicial notice of appellate opinion proper because notice was taken not for the truth of the facts summarized therein, but for the non-hearsay purpose of determining the basis for the conviction]; *Hart v. Darwish* (2017) 12 Cal.App.5th 218, 224-225 [judicial notice of prior court's ruling and the basis for that ruling properly judicially noticed because it was considered for the non-hearsay purpose of determining the basis for the prior court's action, in addition to the ruling being admissible under the official records exception].)

While our focus is on the Council's decision, we first review the Commission proceedings because the council members were provided with an opportunity to review the recording of the Commission hearing before it considered the appeal. Further, the Commission hearing is part of the substantial evidence demonstrating that the Jays did not satisfy the operational capacity and financial stability standards.

As set forth *ante*, much of the discussion during the Commission hearing focused on the FAA exclusivity prohibition and the potential of violating the City's grant assurances. Even Jay, when he testified before the Council, stated that the FBO exclusive rights prohibition and risk of jeopardizing the federal funding was "of course," "the key basis" for the Commission's decision. The chair based his vote to approve on this concern. The other commissioners who voted to approve also did so on grounds not related to the question of whether the Jays met the minimum standards. Moreover, not one of the Commissioners stated that the Jays met the minimum standards. As noted, the Commission chair acknowledged during the hearing that, "[c]learly, during the process," Jay would have to meet the minimum standards. Immediately before taking the vote to approve, the Commission chair stated, "If this does go forward and get approved, there are still a number of things that have to be done. I mean I know in your report for example, there's some requirements perhaps for environmental impact review and a lot of other things. A lot of details that will have to be sorted out." Burkland replied, that he was correct and the details included such things as operating agreements, lease

agreements, environmental review, and the financial analysis that's required as part of the minimum standards.

At the Council hearing, the Commission chair made clear that Jay had merely agreed to comply with the minimum standards and explained that the Commission approved his application "pending certain things that he is going to have to do." According to the chair, the details concerning the minimum standards—which Councilmember Gruedl noted had been "promised but not inked yet"—would have to be "flushed out and made part of [the] proposal," which would come back to the Commission. The proposal would thereafter be turned into a contract. Thus, the transcript of the Council hearing shows that the Commission's approval was essentially conditional on the Jays meeting the Standards.

Additional substantial evidence is found in the transcript of the Council's hearing, indicating that the Council's decision was based on an extensive analysis by the City staff regarding the Jays' FBO operational capabilities and financial stability. In addition to Burkland's report and analysis, Jay himself acknowledged at the Council hearing that their application contained inaccuracies about their proposed fuel provider and that the Jays had not secured the required apron space. The Standards require that an FBO perform "at least" four of five listed aeronautical activities, including aircraft petroleum products sales, aircraft tie-down and aircraft charter, all of which include considerations of ramp space and location of ramp space relative to office space or waiting areas. (Chico Admin. Proc. & Policy Manual (AP&P No. 90-6, §§ II(E), IV(I); V(A)(2), (3).)

The Jays complain that the Council inappropriately considered economic conditions at the airport in addition to operational deficiencies, but it appears the Jays misunderstand the import of the economic consideration as set forth in Burkland's report. Burkland's reference to these matters in the Agenda Report for the Council expressly related to the *practicality* of having a second FBO and to the financial stability standard related to Jay. It was in this context that Burkland opined: it was "not practical for more

than one FBO to provide services at the airport," "the presence of two FBOs would likely result in the failure of both FBOs which would have a devastating effect on the airport and the civil aviation public," "the volatile nature of the business, the unstable economy and the rising cost of fuel all *prevent a second FBO from being financially stable given current conditions at the airport*." Even Jay acknowledged during his testimony before the Commission that, "I think that ultimately there's a good *chance* that *one operator may* prevail over another and *make it*." (Italics added.)

The economic conditions at the airport in 2008 during the economic downturn was a circumstance pertaining to the prospect for any new applicant's financial stability. The Council was entitled to consider and base its decision on this circumstance as it related to the prospect for Jays financial stability. And in any event, the Council was within its authority to deny the application based solely on the substantial evidence of Jays' failure to demonstrate operational capability.

2. Findings

Based on the allegations in the pleadings and matters to which we may take judicial notice, we conclude that the Jays have failed to state a claim that the City failed to make adequate findings. While the record does not contain a resolution setting forth express findings, the findings here were adequate.

In administrative proceedings for which judicial review is available pursuant to administrative mandamus under Code of Civil Procedure section 1094.5, "the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and [the] ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga*).) "Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." (*Id*. at p. 516.) "In addition,

findings [made by an administrative agency] enable the reviewing court to trace and examine the agency's mode of analysis." (*Ibid*.) An administrative body's "findings 'need not be stated with the formality required in judicial proceedings.' " (*Id*. at p. 517, fn. 16.) However, the findings "must expose the [administrative agency's] mode of analysis to an extent sufficient to serve the purposes" of the need for findings. (*Ibid*.)

The findings need not be written. (*Lindborg-Dahl, supra*, 179 Cal.App.3d at p. 963; *City of Carmel-by-the-Sea v. Bd. of Supervisors* (1977) 71 Cal.App.3d 84, 91 (*Carmel*).) " 'While *Topanga* seeks to avoid requiring a reviewing court to conduct a search through the record for some combination of evidence which supports the decision of the agency, it does not preclude a reviewing court from looking to the record to determine the findings upon which the decision is based.' " (*Lindborg-Dahl*., at p. 963, quoting *Carmel*, at p. 91.) The findings may be rendered in oral remarks transcribed from a public hearing where both parties were present. (*Lindborg-Dahl*, at p. 963, fn. 9; *Carmel*, at p. 91.) Findings may be implied in "the language of a motion" and "the reference in a motion to a staff report." (*Pacifica Corp. v. City of Camarillo* (1983) 149 Cal.App.3d 168, 179 (*Pacifica Corp*).) As one court has observed, the judiciary has shown a willingness to focus on the substance rather than the form of administrative actions and "[a]s a practical matter, omissions in [administrative] findings may sometimes be filled by such relevant references as are available." (*McMillan v. American Gen. Fin. Corp.* (1976) 60 Cal.App.3d 175, 184.) The *Topanga* court held, administrative findings are substantively sufficient "if they (1) inform the parties of the bases on which to seek review [citation] and (2) permit the courts to determine whether the decision is based on lawful principles." (*McMillan*, at p. 185, citing *Topanga, supra*, 11 Cal.3d at p. 514.) Here the analytical gap was bridged and the *Topanga* purposes have been served. The Council "accepted" Burkland's recommendation in his agenda Report, which "bridge[d] the analytic gap between the raw evidence and [the City of Chico's] ultimate decision." (*Id.* at p. 515.)

In their reply brief, the Jays argue that the Council's vote to "accept the City Manager recommendation" and deny the recommendation of the Commission did not suffice as findings. The Jays cite *Respers v. University of California Retirement System* (1985) 171 Cal.App.3d 864, 872 (*Respers*), for the proposition that "the record must reflect a *definite, adoptive act* by the agency to adopt another's findings." (Italics added.) *Respers* does not help the Jays.

In *Respers*, the plaintiff sought to compel the University of California Retirement System (UCRS) to set aside its decision denying plaintiff disability benefits. (*Respers, supra*, 174 Cal.App.3d at pp. 866-867.) The UCRS disability review committee denied the plaintiff's application for benefits and after reconsideration, denied the application again. (*Id*. at pp. 868-869.) A hearing was thereafter conducted before an administrative law judge (ALJ). (*Id*. at p. 869.) The ALJ issued a proposed decision in favor of the plaintiff which the review committee rejected. Thereafter, a majority of the UCRS board concurred with the review committee. However, the board made no findings. (*Ibid*.) Plaintiff sought a writ of mandate directing the UCRS to set aside its denial of disability benefits. (*Ibid*.) The trial court denied the petition, reasoning that the UCRS was not required to adopt findings. (*Id*. at pp. 869-870.) The trial court further reasoned that when the board rejected the ALJ's recommendations, it upheld the review committee's decision to deny benefits and thus the Board relied on findings of UCRS staff during the initial determination of eligibility by the review committee and on reconsideration and did not err by not making those findings its own findings. (*Id*. at p. 870.)

On appeal, the *Respers* court reversed. It rejected UCRS's contention that, in rejecting the ALJs recommendations, it impliedly adopted findings that staff and the review committee made when the committee rejected plaintiffs claim. (*Respers*, *supra*, 171 Cal.App.3d at p. 871.) Assuming arguendo that the review committee actually made findings in reliance of the staff reports, the *Respers* court reasoned the record failed to show where the Board adopted the committee's findings as its own, "and indeed, UCRS

ma[de] no contention the Board did so. It is true that an administrative agency may make findings incorporating findings made by others," but "if an agency is to adopt the findings *or report* of others, the record must reflect some adoptive act by the agency." (*Id*. at p. 872, citing *Pacifica Corp, supra*, 149 Cal.App.3d at pp. 179-180, italics added.) The court went on to state: "Absent *some indication* an agency has adopted the findings of others, there is no assurance that findings prepared by others reflect the views of the agency taking the action. Consequently, absent *some indication* of adoption by the Board, we will not assume the Review Committee's findings satisfy *Topanga*'s requirement that the grounds upon which *the agency acted* be clearly disclosed and adequately sustained." (*Respers*, at p. 872, first & second italics added.)

The instant case is distinguishable from *Respers,* because the UCRS board made no reference to the findings of the review committee or staff in issuing its decision. Indeed, it was not even clear to the *Respers* court that the review committee made findings. Moreover, as the quoted and italicized language demonstrates, the record need not reflect "a definite adopted act" as the Jays assert; rather, there need only be "some indication" the agency has adopted the findings of others. We have that here. The colloquy of the council members during the hearing, their questions to Jay and their reference to Burkland's report in their motion is "some indication" they adopted Burkland's factual findings.

Indeed, early in the proceedings, Councilmember Gruendl focused on the failure to demonstrate satisfaction of the Standards. He stated that it was unnecessary to reach the issue of the FBO exclusive rights prohibition, "because we don't have a viable candidate, in which I read this staff report, is that staff indicates that they don't believe applicant meets the minimum standards." Later, Councilmember Gruendl again indicated there was no need to address the FBO exclusive rights prohibition, "because the first thing we have to do is make a determination that the minimum standards are met. He went on to state, "I've found that the proposal did not meet minimum standards under

section four of, of our ninety point six AP&P that it didn't, it didn't meet section A, Paragraph one, Paragraph two, part A, part D, part E. Paragraph three, Part A, Paragraph four, part A, D, and E, Paragraph five, part D."

The Jays assert that the provisions in the Standards, which Councilmember Gruendl referenced, are non-existent. They point out that section IV does not contain a paragraph one of section (A) or any subparagraphs. However, we note that section V does contain the subparagraphs Councilmember Gruendl mentioned. Section V(A) pertains to activities FBOs are required to conduct and most of the subparagraphs Councilmember Gruendl mentioned correspond to provisions in section V which also were addressed in the analysis attached to Burkland's report. We shall identify them in the order stated by Councilmember Gruendl.

Section V, subparagraph (A)(1) of the Standards pertains to activities related to aircraft charters. One of the provisions thereunder, subparagraph (A)(1)(d), requires "adequate apron space for emplaning and deplaning passengers and storing aircraft." In the analysis Burkland attached to both the Commission and Council Agenda Reports, he noted that Jay had only made arrangements for *temporary* ramp space for aircraft associated with flight training and aircraft charters. And as Jay admitted during the Council hearing, even that temporary arrangement was no longer viable.

Section V, subparagraph (A)(2) of the Standards pertains to activities related to aircraft petroleum product sales. Jay admitted during the Council hearing that he did not meet the standards for fuel service when he told the Council, "we already meet the necessary minimum operating standards *with the exception of fuel service*." (Italics added.) Additionally, subparagraph (A)(2)(a) of section V requires customer access to "conveniently located" and "adequately appointed facilities" for aircraft customers to use during fueling operations. Subparagraph (A)(2)(d) requires the provision of "conveniently located Airport apron space, of adequate area" to service aircraft during fueling operations. Subparagraph (A)(2)(e) requires the provision of "at least one acre of

unassigned apron parking and tie-down space for customer use" during fueling operations and further requires the FBO to "demonstrate capacity to effectively and safely move aircraft to these spaces and store them, pending fueling." The staff analysis attached to Burkland's report notes the one acre apron parking standard would have to be met and further notes that "[c]onsideration should be given to the fact that there is also a requirement for a conveniently located office/waiting room facility, *and pilots and their guests would have to walk or be transported from the [proposed fueling area] to the FBO offices*." (Italics added.) None of the requirements, which Gruendl mentioned by listing Standards section numbers, are addressed in the Jays' application; nor did he address them during his comments to the Council despite the reference in the staff analysis.

Section V, subparagraph (A)(3) of the Standards pertains to aircraft tie-down for the public and (A)(3)(a) requires the FBO to provide sufficient space for "convenient, safe parking of itinerant and based aircraft." Again, the staff analysis noted the Jays' plan for *temporary* ramp space and went on to comment that "[t]he ramp issue will need to be resolved before this activity can be implemented."

Section V, subparagraph (A)(4) of the Standards pertains to aircraft engine and/or accessory maintenance. Subparagraph (A)(4)(a) requires the FBO to provide access to "adequate office, waiting room and maintenance hangar facilities." Subparagraph (A)(4)(d) requires the FBO to provide "adequate airport parking space for storage of customer aircraft awaiting maintenance and demonstrate capacity to effectively and safely move aircraft to these spaces and store them." Subparagraph (A)(4)(e) requires FBOs to store non-airworthy aircraft in a particular way. The staff analysis noted that because another operator was to provide this service under the Jays' proposal, Commission approval and an operating agreement would be required. The analysis also noted the requirement for storage of non-airworthy aircraft and parking for aircraft awaiting maintenance. The analysis went on to note that "[a]t present, no adequate hanger space or ramp space is available for this type of operation, and no parking space is

available for waiting aircraft. Mr. Jay has requested the Airport Commission's consideration of one or two hangars on delta row for use by [the operator] to house and perform aircraft maintenance and installation of new avionics."

Section V, subparagraph (A)(5) of the Standards pertains to flight training and subparagraph (A)(5)(d) requires the provision of an adequate number of flight-training aircraft. The staff analysis noted that because Jay planned to provide this service through another operator, the Standards required Commission approval.

The Jays contend that while Councilmember Gruendl's comments may have represented his own thinking, nothing in the record indicates his comments were adopted by the Council as a whole. We disagree. In context, Gruendl's comments were made almost immediately before the mayor called for the vote on the motion. In our view, Gruendl's comments are simply additional evidence of "some indication" the Council adopted the findings in Burkland's report and attached staff analysis. (See *Respers, supra,* 174 Cal.App.3d at p. 872.)

We note that when the mayor called for the question he stated the motion slightly differently than originally made. Where the motion had been to "*accept* the City Manager recommendation" and "uphold the appeal . . . by denying the recommendation of the Airport Commission", the mayor stated the motion was to "*follow* the recommendation of the City Manager and to uphold the appeal thereby denying the recommendation of the Airport Commission." (Italics added.) Nevertheless, this language along with the questions the council members posed to Jay that went directly to deficiencies pointed out in Burkland's report and analysis and the colloquy of the council members during the hearing all indicate that the Council adopted Burkland's factual findings. Indeed, there is nothing in the record indicating why they would have "accepted" or "followed" his report, granted the appeal and denied the Jays' application if they had not been in agreement with those findings. On this record, we will not conclude

there were no findings or that they were inadequate based on the Council's failure to use the magic word "adopt" instead of "accept" or "follow" in reference to Burkland's report.

E. Estoppel

The Jays claim in their petition that Burkland induced them not to provide financial information prior to the Council hearing and thus the petition properly alleged that the City was estopped in claiming the Jays failed to comply with the financial stability standard. Specifically, the Jays alleged in the petition that Burkland "dishonestly urged" the financial stability ground to the Council knowing that "he had waived" it. They alleged that Burkland "manufacture[d]" the financial stability grounds presented to the Council, knowing that he had informed Jay that "demonstration of his financial stability would not be required *until after the grant*" and Jay relied on this representation. (Italics added.) The Jays rely on three communications in asserting the estoppel claim.

They alleged the first communication took place on March 11, 2008, almost six months before the Council hearing. They alleged that at that time, Burkland told Jay there is "no need to demonstrate financial stability until after *approval*." (Italics added.) This allegation was supported with a string of e-mails attached to the petition as an exhibit, in which staff asked Jay if he had a "business plan or some similar document," but it would be "ok" if he did not because that was "not something that needs to be provided at *this point*." (Italics added.) According to the petition, these e-mails "confirmed Birkland's waiver of the necessity to demonstrate financial stability *until after the approval*." (Italics added.)

The second communication is the analysis attached to the Commission's agenda report for their July 29, 2008, meeting and later attached to the Council's agenda report for the September 2, 2008, hearing. There, staff informed the Commission that "the minimum standards requires that 'Operators shall demonstrate to the satisfaction of the Commission their financial stability and operational capability in connection with the proposed operations. In this regard, the Commission may consider credit ratings,

financial statements, business ratings, references, and such other sources as it deems necessary and appropriate.' *If the proposal is approved, Mr. Jay should provide the City with information on the financial stability of his proposed operations*." (Italics omitted, italics added.)

The third communication were comments Burkland made at the end of the July 29, 2008, Commission hearing in response to a question posed by the chair just before the commissioners voted on the Jays' application. We have previously mentioned this statement. The chair asked, "If this does go forward and get approved, there are still a number of things that have to be done. I mean I know in your report for example, there's some requirements perhaps for environmental impact review and a lot of other things. A lot of details that will have to be sorted out and I'm assuming that that's going to be handled through your office." Burkland replied, "That's correct. I think it would include operating agreements, lease agreements, environmental review, and then the financial analysis that's required as part of the minimum standards."

Jay did not allege in his petition that he told the Council during the Council hearing he had been led to believe that demonstrating financial stability had been waived or postponed until after the Council hearing based on the aforementioned statements or any other communications. Indeed, the transcript of the Council hearing does not show he made any such complaint. Assuming his estoppel claim is not forfeited for failure to raise it at the Council hearing or ask the Council for a continuance to demonstrate financial stability, we conclude that the petition does not adequately plead the estoppel claim.

The elements of equitable estoppel are: (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend that his or her conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to his or her injury. (*Strong v. County of Santa*

Cruz (1975) 15 Cal.3d 720, 725.) The detrimental reliance must be reasonable. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 35.)

The Jays assert in their opening brief on appeal that "[a]s a consequence of Burkland's *reneging on his promise*, Jay has had *no opportunity* to demonstrate Standards compliance." (Italics added.) In their reply brief the Jays assert that Burkland's "deceit cost Jay the right to perform the FBO [f]unction at the airport."

However, the statements upon which the Jays rely all took place prior to or during the Commission hearing on July 29, 2008. And they all relate to Commission approval. According to the pleadings and the judicially noticed materials, these statements by Burkland promised nothing more than a postponement of the requirement that the Jays demonstrate financial stability until after the Commission approval. This is confirmed by the Commission chair's comments at the Council hearing, where he said the Jays had agreed to meet the Standards, that the Commission had approved the Jays' application "pending certain things that he is going to have to do", and that details concerning the minimum standards would have to be "flushed out and made part of [the] proposal." Jay has not pled facts establishing the second element of estoppel, Burkland's intent that Jay rely upon the statements to forgo showing financial stability before the Council hearing. At best, the facts pled establish that Burkland's intent was that Jay could postpone providing proof of financial stability until after the Commission's approval, but after the approval Jay would have to show proof. Moreover, the Jays have not pled facts showing why he did not have the "opportunity" to demonstrate financial stability to the Council as alleged in their petition.

We also conclude, based on the pleadings and the matters subject to judicial notice, that the Jays have not pleaded facts demonstrating the fourth element of estoppel--that it was reasonable to rely on the cited statements as an excuse for not establishing financial stability after the Commission's approval. Nor have the Jays pleaded facts supporting a claim that those statements resulted in injury because no facts have been

pled indicating that anything prevented the Jays from providing proof of financial stability at any time before the Council hearing, which they ultimately would have had to provide to the Commission before being allowed to operate as an FBO.[31]

Furthermore, it is well settled that "an estoppel will not be applied if it would nullify a strong rule of policy meant to benefit the public." (*D'Egidio v. City of Santa Clarita* (2016) 4 Cal.App.5th 515, 533; *Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, 310.) The Jays do not assert, nor could they assert that requiring FBO applicants to show financial stability is not a strong rule of public policy meant to benefit the public.[32] For this alternative reason, the Jays have failed to adequately state a claim of estoppel.

The Jays also claim that the City should be estopped from claiming that the Jays failed to establish operational stability based on the same statements made by Burkland. But Burkland's statements focus on financial stability, not operational capacity relative to the duties the Jays would have to perform as an FBO. The Jays could not reasonably rely upon Burkland's statements for Jay's failure to establish his capability to perform the various aspects of the FBO function at issue here.

F. FBO Exclusive Rights Violation Claim

The Jays alleged in their petition that Council effectively granted the Rocks an exclusive right to operate as an FBO in violation of the AAIA and they continue to advance that claim on appeal.

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[31] We are aware that an appeal to the Council stays the Commission's decision. (CMC § 2.80.100.) However, while the Jays mentioned this ordinance in a footnote in the petition, they never pleaded that they did not demonstrate proof of financial stability after the Commission approval because of the stay. Moreover, even if they had, this does not excuse them from demonstrating financial stability, nor would it have been reasonable for them to delay making the showing, because they were going to have to do so before being allowed to operate as an FBO.

[32] While the requirement reflects a strong rule of public policy meant to benefit the public, as we discuss *post*, the Standards do allow for a waiver by the Commission.

1. Private Right of Action under the AAIA

The Jays rely heavily on FAA advisory circular No. 5190-6, which explains "the denial by the airport sponsor to afford other *qualified* parties an opportunity to be an on-airport aeronautical service provider" is an exclusive rights violation. (Italics added.) However, the AAIA provides no private right of action for a violation of grant assurances outside of a complaint to the FAA. (*McCasland v. City of Castroville* (5th Cir. 2013) 514 Fed.Appx. 446, 448 [49 U.S.C. § 47107 does not create a private right of action for parties aggrieved by discrimination]; *Four T's, Inc. v. Little Rock Mun. Airport Comm.* (8th Cir. 1997) 108 F.3d 909, 915-916 [courts interpreting 49 U.S.C. § 47107 and its predecessor statute have held that those statutes do not provide a private right of action based on a violation of grant assurances to prohibit discrimination]; *Northwest Airlines, Inc. v. County of Kent, Michigan* (6th Cir, 1992) 955 F.2d 1054, 1058-1059 ["Congress intended that there would be no private right of action under the [AAIA]"]; *Interface Group, Inc. v. Massachusetts Port Authority* (1st Cir. 1987) 816 F.2d 9, 14-15 (*Interface*) [predecessor statute providing that there shall be no exclusive right for use of any landing area or air navigation facility upon which federal funds have been expended does not create a private right of action; nothing in the legislative history suggests any intent to create such a right of action, and the statute provides an administrative scheme that suggests Congressional intent for administrative expertise at the enforcement stage]; *Scott Aviation, Inc. v. DuPage Airport Authority* (N.D. Illinois 2005) 393 F.Supp.2d 638, 647.) The AAIA grants exclusive jurisdiction to the FAA to enforce compliance with grant assurances. (49 U.S.C. §§ 47122(a), 41711(f).)

In their reply brief, the Jays contend that they have standing to enforce the FBO exclusive rights prohibition if pleaded as a violation of law under section 1983 of title 18 of the United States Code (§ 1983). However, the Jays never pleaded a cause of action under § 1983 in their petition, and they did not state that they could amend their complaint to state such a cause of action in their opening brief. Therefore, any such

amendment is forfeited. (*Allen, supra*, 234 Cal.App.4th at pp. 52, 56; *Reichardt, supra*, 52 Cal.App.4th at p. 764; *Neighbours, supra*, 217 Cal.App.3d at p. 335, fn. 8; *New Plumbing, supra*, 7 Cal.App.4th at p. 1098.)

Moreover, even if not forfeited, the Jays have not shown that a § 1983 claim could be properly pleaded here. The Jays rely on the three-part test discussed in *Blessing v. Freestone* (1997) 520 U.S. 329, 340 [137 L.Ed.2d 569] (*Blessing*), which they point out was decided after some of the cases holding that there is no private right of action under the AAIA. *Blessing* does not help the Jays. First, the test set forth in *Blessing* was actually first articulated in *Wilder v. Virginia Hospital Assn.* (1990) 496 U.S. 498, 509 [110 L.Ed.2d 455] (*Wilder*). (*Blessing*, at p. 338.) *Wilder* predates all but one of the AAIA cases cited *ante*. Second, *Blessing* did not arise in the administrative context and thus there was no administrative enforcement mechanism available for private persons.

Blessing involved a lawsuit brought by five mothers whose children were eligible to receive child support services pursuant to federal law. (*Blessing, supra*, 520 U.S. at p. 332.) They claimed that Arizona had failed its federal obligation to collect child support for them and they had a private right to have the state's program achieve "substantial compliance with the federal mandate." (*Id*. at pp. 332-333.) Citing *Wilder*, the *Blessing* court noted the following test for determining the existence of a private right of action under § 1983: "First, Congress must have intended that the provision in question benefit the plaintiff. [Citation.] Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence. [Citation.] Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." (*Blessing,*. at p. 340, citing *Wilder, supra*, 496 U.S. at pp. 510-511.) However, the court noted that "[e]ven if a plaintiff demonstrates a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under

[§] 1983." (*Blessing,* at p. 341.) Because the court's "inquiry focuses on congressional intent, dismissal is proper if Congress 'specifically foreclosed a remedy under § 1983.' [Citation.] Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or *impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983*." (*Blessing,* at p. 341, italics added.)

In their reply brief, the Jays cite to a page in the syllabus of *Fitzgerald v Barnstable School Committee* (2008) 555 U.S. 246, 247 (*Fitzgerald*), and argue based on that summary that the high court there "crystallize[d]" factors pertinent to overcoming the presumption. They argue that under *Fitzgerald*, courts should examine the administrative remedy and compare it with the remedy available under § 1983. They assert that "[w]here, as here the administrative remedy for AAIA statutory violations -- withholding funds from the offending Sponsor -- provides no meaningful remedy for those Congress intended to protect, [section] 1983 becomes available as an alternative remedy."

We do not agree with the Jays view of *Fitzgerald* as it applies to statutory rights. A review of the actual opinion in *Fitzgerald* (and not just the syllabus) reveals that while the analysis they suggest might apply to a constitutional violation alleged as § 1983 right, it does not apply to § 1983 claims based on a purported "statutory right." The *Fitzgerald* court explained: "In cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights." (*Fitzgerald, supra,* 555 U.S. at p. 252-253.) "In those cases in which the [section] 1983 claim is based on a statutory right, 'evidence of . . . congressional intent may be found directly in the statute creating the right, *or inferred from the statute's creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983*." (*Fitzgerald,* at p. 252.) Thus, in determining whether a statute precludes the enforcement of a federal

right under § 1983, the high court places "primary emphasis on the nature and extent of that statute's remedial scheme." (*Fitzgerald*, at p. 253.) Where providing plaintiffs "a direct route to court via section 1983" would circumvent statutory procedures and provided benefits that are unavailable under the statutes, a section 1983 claim is prohibited. (*Fitzgerald*, at p. 254.) " 'Allowing a plaintiff to circumvent' " the statutes' provisions in this way [would be] 'inconsistent with Congress' carefully tailored scheme.' " (*Id*. at p. 255.)

Here, there is an enforcement scheme established by statute and regulation which the Jays ignore. Section 47122 of title 49 of the United States Code allows the Secretary of Transportation to prescribe regulations and conduct investigations and public hearings. Thus, compliance with the requirements of the AAIA regulations by airport sponsors is enforced through the procedures of [the AAIA] and the regulations implementing them. (14 C.F.R. § 26.105(a).) Failure to comply with a grant assurance subjects the City to "appropriate program sanctions" including "suspension or termination" of federal funds or "refusal to approve grants" "until deficiencies are remedied." (14 C.F.R. §§ 26.101(a), 16.109(a).) Alternatively, "a cease and desist order" may be issued or the FAA Director could order the City to "submit a Corrective Action Plan." (14 C.F.R. § 16.109(a)(c).) The FAA's enforcement regulations permit a party "directly and substantially affected" by an airport sponsor's alleged noncompliance with a grant assurance or "any person who knows of a violation" to file a formal complaint with the FAA. (14 C.F.R. § 16.23(a), 26.15(c).) However, before a formal complaint can be filed, the party must "attempt to resolve the disputed matter informally" through alternative dispute resolution mechanisms, e.g. mediation, arbitration, etc. (14 C.F.R. §§ 16.21(a).) If the complaint demonstrates a "reasonable basis for further investigation," the FAA investigates the allegations, after which the Director of the Office of Airport Safety and Standards issues an "initial determination." (14 C.F.R. §§ 16.29(a), 16.31(a).) The Director's initial determination may include a "Corrective Action Plan." (14 C.F.R. § 16.31(c).) If the

Director dismisses the complaint, the interested party can file an administrative appeal to the Associate Administrator for Airports, who examines the existing record and issues a final decision without a hearing. (14 C.F.R. §§ 16.31(c), 16.33(b)(1).) This final decision is then appealable, but only to a federal court of appeals. (49 U.S.C. § 46110(a); 14 C.F.R. § 16.247(a).) The FAA circular the Jays have repeatedly cited sets forth this procedure.

This procedure is comprehensive and allowing the Jays to circumvent the statutes and regulations would be inconsistent with that carefully tailored scheme. (*Fitzgerald, supra,* 555 U.S. at p. 255.) Moreover, as an earlier court observed in rejecting a private cause of action in connection with the AAIA's predecessor statute, the federal scheme suggests a Congressional intent for administrative expertise in enforcement, "an expertise that tends to be lost when private parties can enforce the statute directly in federal court." (*Interface Group, supra,* 816 F.2d at pp. 14-15.)

Finally, even if the Jays' reading of *Fitzgerald* is correct and we are to examine the administrative remedy, compare it with the remedy available under § 1983 and allow a private right of action under § 1983 if the administrative remedy does not provide a remedy for those Congress sought to protect, their contention still fails. In their petition, the Jays seek a writ of mandate ordering the City to "follow the law," and compel the City and its officers to exercise their functions according to the law, including federal statutes. In other words, they seek an order directing the City to comply with the AAIA. But the AAIA administrative enforcement mechanisms are essentially coercive and provide the same remedy. With the threat of suspending funding or refusing additional funding, the regulations allow for cease and desist orders and compliance plans. Allowing the Jays a private cause of action under section 1983 would allow them to circumvent the provisions of the AAIA and its regulatory scheme which involves decision makers who have the administrative expertise to achieve the same end they

would have achieved had they sought enforcement under the AAIA. This would be inconsistent with the "carefully tailored" federal scheme.

Accordingly, even if a § 1983 claim were not forfeited, the Jays have not stated a cause of action under that provision for a violation of the AAIA FBO exclusive rights prohibition.

2. FBO Exclusive Rights Prohibition Exception

Even if the Jays have a private right of action under the AAIA or § 1983 for a violation of the City's AAIA assurances against FBO exclusivity, the Jays' pleadings and the matters to which we may take judicial notice show that an exception to the FBO exclusive rights prohibition applies.

Section 47107 of title 49 of the United States Code sets out an exception and provides in pertinent part: "(a) General written assurances.--The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that—[¶] . . . [¶] (4) a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport, with a right given to only one fixed-base operator to provide services at an airport *deemed not to be an exclusive right if*-- [¶] (A) the right would be unreasonably costly, burdensome, *or impractical* for more than one fixed-base operator to provide the services; and [¶] (B) allowing more than one fixed-base operator to provide the services would *require reducing the space leased under an existing agreement* between the one fixed-base operator and the airport owner or operator." (Italics added.) The City's grant assurances track this statutory language.[33] Thus, the existence of two circumstances set

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[33] Item No. 23 of the assurances reads in pertinent part: "**Exclusive Rights**. [City] will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, the

forth in section 47107(a)(4)(A) and (B) of title 49 of the United States Code allow exclusivity.

a. Impracticality

At least twice in the petition, the Jays misleadingly set forth the requirements of the first prong of the exception by artfully utilizing ellipses in substitution for the word "impractical." The Jays stated the first prong as follows: "providing services at an airport by only one [FBO] is not an exclusive right if – (1) it is unreasonably costly, burdensome, . . . etc." The word "impractical," intentionally omitted by the Jays, is critical here. While "impractical" is not defined in the statutory scheme, the common meaning of the word includes: "a: not wise to put into or keep in practice or effect; b: incapable of dealing sensibly or prudently with practical matters; c: impracticable." (< https://www.merriam-webster.com/dictionary/impractical> [as of May 29, 2019], archived at <https://perma.cc/6EYL-LL39>.) Despite the Jays' repeated assertions in the petition that economic conditions at the airport is not a valid reason for the Council's decision, that circumstance is clearly relevant to the impracticality prong of the FBO exclusive rights prohibition exception.

We note that Burkland used the word "practical" multiple times in both his reports to the Commission and the Council. In the fiscal impact section of the agenda report to the Commission, Burkland wrote: "[B]ased on the economic difficulties experienced by previous [FBOs], it would not be *practical* for more than one FBO to provide services at the Chico Municipal Airport at this time." He then went on to state: "[Given] the volatile nature of the business, the unstable economy, and the rising cost of fuel, at this

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providing of the services at the airport by a single [FBO] shall not be construed as an exclusive right if both of the following apply: [¶] a. It would be unreasonably costly, burdensome, or impractical for more than one [FBO] to provide such services and [¶] b. If allowing more than one [FBO] to provide such services would require the reduction of space leased pursuant to an existing agreement between such single [FBO] and such airport."

time the competition from an additional FBO would not be in the best interests of the airport and would not serve the civil aviation needs of the public. Competition for fuel sales, the major revenue source for any FBO, would not promote business, but would have a devastating effect on the existing FBO *and any other operator allowed to fuel planes*." (Italics added.) Burkland repeated this statement in the fiscal impact section of the report to the Council. In the agenda report for the Council hearing, Burkland further wrote, "it is *not practical* for more than one FBO to provide services at the airport and the existence of two FBOs would likely result in the failure of both FBOs which would have a devastating effect on the airport and the civil aviation public. At the Council hearing, Burkland told the Council, "I would believe it would not be *practical* that more than one FBO to provide services at our airport" and then went on to discuss competition for fuel sales.

As noted, Jay himself told the Commission, "I think that ultimately there's *a good chance that one operator may prevail over another and make it*." (Italics added.) The clear implication of this statement is that economic conditions would have an impact on both FBOs.

Thus, despite the Jays' repeated assertions in their petition and their appellate briefing that a decision that took into account economic conditions was invalid, economic conditions were relevant not only for the Jays' prospects of survival as a new FBO and their own financial stability, but those circumstances were also pertinent to an FBO non-exclusivity exception.

b. Reduction of Leased Space

The second prong of the exception, "allowing more than one fixed-base operator to provide the services would require *reducing the space leased* under an existing agreement between the one fixed-base operator and the airport owner or operator" (49 U.S.C. § 47107(a)(4)(B), italics added), was not clearly manifest at the time of the Commission hearing because of Jays' changing plans for ramp space. While the

Commission chair did not disagree with Burkland's view that the various economic conditions could be considered under the first prong of the exception, the chair concluded in his memorandum to the Council that "[t]here is nothing in the proposal before the [C]ommision requiring the reduction of space leased to Northgate." However, Jay himself showed the existence of this circumstance when he testified at the Commission hearing that some encroachment onto the Rock's leased space would be required by his proposal. The encroachment Jay described -- driving his trucks onto the space the Rocks paid for in their lease -- would have the effect of reducing the Rock's leased space whenever such encroachment occurred.

Based on the pleadings and the materials for which we may take judicial notice, the Jays have failed to state facts showing that the exception does not apply.

3. Satisfaction of the Minimum Standards

As we have discussed *ante*, the Council clearly denied the Jays' application because the Jays had not met the operational capability and financial stability standards. As the FAA advisory circular the Jays repeatedly cite notes, "The fact that a single business or enterprise may provide most or all of the on-airport aeronautical services is not, in itself, evidence of an exclusive rights violation. What is an exclusive rights violation is the denial by the airport sponsor to afford other *qualified parties* an opportunity to be an on-airport aeronautical service provider." (Italics added.) The pleadings and the materials for which we may take judicial notice establish that that the Jays were not "qualified" because they did not meet the minimum standards.

Nothing prevents the Jays from reapplying with an FBO application that meets the Standards. Indeed, Burkland's agenda report to the Council gave his recommendation for disapproval "at this time." And the ACA advised the Council that it could conclude differently "at a later date" as circumstances changed.

G. Exhaustion/Forfeiture/§ 1983 Based on Constitutional Rights

Applying the exhaustion doctrine, the trial court concluded that the Jays failed to preserve numerous arguments by failing to raise them before the Council, including: the notice was inadequate; the Jays were not given sufficient time to present their case; the city attorney's involvement in the Counsel hearing was improper and the Council's decision impaired their contract rights. In their petition and their appellate briefing, the Jays contend that the exhaustion doctrine does not apply to these arguments.

We agree that these matters have not been preserved, but not because of the exhaustion doctrine. "The real issue is not exhaustion of administrative remedies, but 'a corollary principle to the doctrine that administrative remedies must be exhausted. That principle is: a litigant must fully present its arguments and evidence at the administrative hearing. " ' "Before seeking judicial review a party must show that he has made a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings." ' [Citation.]" 'The requirement that a litigant present his or her arguments and evidence fully at the administrative hearing level is analogous to the doctrine of exhaustion of administrative remedies, though it is based on different policies.' (1 Cal. Administrative Mandamus: Laying the Foundation at the Administrative Hearing (Cont.Ed.Bar 3d ed. (2003) § 3.49, p. 82 ([Cal.]) Administrative Mandamus).)" (*Sustainability, Parks Recycling and Wildlife Defense Fund v. Department of Resources Recycling and Recovery* (2019) 34 Cal.App.5th 676, quoting *In re Electric Refund Cases* (2010) 184 Cal.App.4th 1490, 1502; accord *Moore v. City of Los Angeles* (2007) 156 Cal.App.4th 373, 383 (*Moore*); *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019-1021 (*Walnut Creek*).)

For example, in *Hooks v. State Personnel Bd.* (1980) 111 Cal.App.3d 572 (*Hooks*), a state employee argued that the employment termination procedure used by his employer did not comport with the due process safeguards outlined in *Skelly v. State Personnel*

Board (1975) 15 Cal.3d 194 (*Skelly*). (*Hooks*, at p. 577.)[34] At the administrative hearing, Hooks raised no due process claim, but rather raised it for the first time on appeal. The *Hooks* court held that the issue was waived. (*Ibid*., citing *Harris v. Alcoholic Beverage Control Appeals Bd*. (1961) 197 Cal.App.2d 182 (*Harris*).)

In *Harris*, *supra*, 197 Cal.App.2d 182, the court held that the Alcoholic Beverage Control Appeals Board improperly considered a new issue raised by a liquor licensee for the first time on first level administrative appeal of a decision of the Department of Alcoholic Beverage Control suspending the liquor license. (*Id*. at pp. 184, 187.) The court in *Harris* wrote: " 'It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or "skeleton" showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court. [Citation.] The rule compelling a party *to present all legitimate issues* before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play.' " (*Id*. at p. 187.)

Seeking to avoid the obligation to preserve constitutional claims for review and confusing forfeiture with exhaustion, the Jays assert a new theory not advanced in the trial court. They assert in their opening brief that Jay had "no obligation to have his § 1983 claims subjected to administrative review." The argument is curious, to say the least, because as we have noted, they never alleged a section 1983 claim in their petition. After the City pointed this out in its briefing, the Jays argued in their reply brief that *"[t]he trial court failed to consider* the facts Jay pled which are remediable under 42 U.S.C. [section] 1983. . . . While *it is true that section 1983 is not mentioned by name in the petition*, the rights protected by section 1983 are pled all over it," citing the

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[34] The Jays rely on *Skelly* in asserting their claim that the failure to provide adequate notice here violated their due process rights. We discuss this claim, *post*.

petition allegations related to due process. (Italics added.) But the *failure* in this regard was not the trial court's; it was the Jays'. They did not plead it, and they did not ask the trial court to consider this theory in connection with the City's contention they failed to preserve their constitutional claims. As for this appeal, Jay never mentioned what rights were implicated by his supposed section 1983 claims in his opening brief. Because they failed to state what rights were implicated in the section 1983 claims in their opening brief, the argument is forfeited, not for failure to raise it during the Council hearing, but for failure to raise it the opening brief. And in any event, as we discuss *post*, the Jays' constitutional claims fail.

H. Entitlement/Vested Right

Much of the Jays' petition is grounded on the repeated claim that the Commission's approval vested in them an entitlement to operate as an FBO, which the Council revoked. For example, the Jays pleaded: "As a product of compliance with the City's Standards[,] Jay 'had a legitimate claim of entitlement' to perform the FBO function at the airport." They further pleaded: "On 7/29/08, the Airport Commission approved Jay's application and granted Jay's entitlement to perform the FBO function." Additionally, they pleaded that the Council "wrongfully revoked Jay's Airport Commission granted entitlement." They consistently referred to the Council's actions as "revoking" or as a "revocation" and referred to the Council hearing as a "revocation hearing." The Jays even equated the Council's decision to revocation of a professional license. Yet, their pleadings and the matters to which we may take judicial notice do not support those claims.

As we have noted, the Commission never found that the Jays complied with the Standards. In fact, the Jays never alleged in the petition that the Commission expressly stated that they met the minimum standards. Instead, the Jays pleaded: "[O]n 7/29/08 the Airport Commission approved Jay's application and granted Jay's entitlement to perform the FBO Function. *Implicit* in that grant was the reality that Jay's application

complied with the Standards." But even that assertion is at odds with the materials of which we take judicial notice. At best, those materials indicate that the Commission's approval was conditioned upon later compliance with the Standards.

As set forth *ante*, much of the discussion during the Commission meeting focused on the FAA exclusivity prohibition and the potential of violating the City's grant assurances. Even Jay, when he testified before the Council, said the exclusivity prohibition and risk of jeopardizing the federal funding was "the key basis" for the Commission's decision. Importantly, not one of the commissioners stated that the Jays met the minimum Standards. As we have noted, immediately before taking the vote to approve, the Commission chair confirmed that the Jays had more to do. At the Council hearing, the chair testified that the Jays had merely agreed to comply with the Standards and expressed the belief that the Commission could not turn him down when he had agreed to do so. The chair further commented that their application had been approved "pending certain things that he is going to have to do." The details concerning the minimum standards, which Councilmember Gruedl noted had been "promised but not inked yet," would, according to the chair have to be "flushed out and made part of [the] proposal," which would come back to the Commission. The proposal would thereafter be turned into a contract.

Thus, the Jays' repeated claim throughout their petition that the Commission found that they met the minimum standards and that the Commission's approval amounted to an entitlement or vested right is simply belied by the transcript of the Commission and Council hearings, to which we take judicial notice. With this in mind, we continue our discussion.

I. Equal Protection Claim

or the first time, the Jays argue on appeal that the Council violated their right to equal protection, contending that Burkland waived the minimum Standards for the Rocks but not for the Jays. Having failed to raise this claim at the Council hearing, the claim is

forfeited. (*Electric Refund, supra,* 184 Cal.App.4th at p. 1502; *Moore, supra*, 156 Cal.App.4th at p. 383; *Hooks, supra*, 111 Cal.App.3d at p. 577; *Walnut Creek, supra*, 101 Cal.App.3d at pp. 1019-1021; *Harris, supra,* 197 Cal.App.2d at p. 187.)

Moreover, even if it is not forfeited, to prevail on an equal protection claim, the Jays must allege facts that show that they are similarly situated to the Rocks. " 'The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.' " (*In re Gary W.* (1971) 5 Cal.3d 296, 303; *Stirling v. Brown* (2018) 18 Cal.App.4th 1144, 1157.) The Jays' petition establishes that when they submitted their petition, they were not similarly situated to the Rocks. The petition alleged that, "on October 17, 2005, [the Rocks] purchased the assets of Redding Aero. . . . The next day, October 18, 2005, [the Rocks] 'took over' the FBO." The Rocks later entered into a contract on July 20, 2007, with Commission approval. The Jays' application to be an FBO is different. They did not "take over" an existing FBO operation. They did not engage in two years of service as an FBO before signing contracts with the City approved by the Commission. Thus, they have not established that they are similarly situated.

J. Fair Hearing/Procedural Due Process Claims

"By statute, a writ is appropriate where the petitioner has been deprived of a fair hearing." (Code Civ. Proc., § 1094.5, subd. (b); *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170 (*Clark*).) The Jays assert in their petition a variety of fair hearing and procedural due process claims, including lack of notice, insufficient time to present their case to the Council, no opportunity for rebuttal, and no opportunity for cross-examination. Like their equal protection claim, these claims are also forfeited. (*In re Electric Refund Cases, supra,* 184 Cal.App.4th at p. 1502; *Moore, supra*, 156 Cal.App.4th at p. 383; *Hooks, supra*, 111 Cal.App.3d at p. 577; *Walnut Creek, supra*, 101 Cal.App.3d at pp. 1019-1021; *Harris, supra,* 197 Cal.App.2d at p. 187.) Moreover, they are all meritless.

1. Due Process

The threshold requirement of a due process claim is governmental deprivation of an entitlement or vested right. As the court in *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837 (*Las Lomas Land*), noted: " 'The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.' " [Citation.] . . . [¶] A person seeking a benefit provided by the government has a property interest in the benefit for purposes of procedural due process only if the person has "a 'legitimate claim of entitlement to it.' " (*Los Lomas Land*, at pp. 852-853.)

As we have seen, nothing the Commission did provided the Jays with an entitlement or a vested right. Therefore, the Jays have failed to state a valid claim of procedural due process pertaining to the Commission action and the City's denial of their FBO application.

The Jays also claim they had a vested property right related to the 1988 contracts that required the protections of due process. We have addressed the 1988 contracts in our decision related to the Jays litigation against the Rocks and we further discuss their property right claim in the writ petition, *post*. For now, we simply note that any benefit the Jays sought from the use of their building as an FBO was subject to the City's discretion, and "[a] benefit is not a protected property interest under the due process clause if the decision maker has the discretion to grant or deny the benefit." (*Las Lomas Land*, *supra*, 177 Cal.App.4th at p. 853.)

2. Statutory Fair Hearing Rights

As for the Jays' fair hearing theories under Code of Civil Procedure section 1094.5, subdivision (b), we conclude based on the pleadings and the judicially notice materials, the Jays failed to state a claim that they did not receive a fair hearing.

a. Notice

The Jays assert that the Rocks' notice of appeal was inadequate. As grounds for their appeal, the Rocks listed the following in their notice of appeal: (1) the Commission's decision "was *contrary to the staff report*"; (2) the Commission's decision "will damage Chico Muni Airport [and] existing FBO"; and (3) "due to discriminatory decision by conflict and bias" by the commissioners who voted to approve. (Italics added.) The Jays assert that since the Rocks' notice of appeal did not expressly reference the Jays' failure to demonstrate operational capacity and financial stability as grounds for the appeal, the Jays had no notice that the Council's decision would be based on those issues. In their petition, the Jays asserted that, as a result, they were not able to prepare a defense. The Jays did not inform the Council of this purported notice deficiency; nor did they request a postponement to better address the operational capacity and financial stability issues. Consequently, for the reasons discussed *ante,* the claim is forfeited. Additionally, even if not forfeited, the claim is without merit.

Here, the Jays once again misrepresent key language. The Jays assert that the Rocks' notice said the Commission's decision was "*against* Staff Report." (Italics added.) But the language in the notice reads, "*contrary* to the staff report." (Italics added.) Burkland's July 29, 2008, agenda report for the Commission included an attached staff analysis, which discussed the Jays' failures to show operational capacity for the FBO functions later discussed at the Council hearing. The staff analysis also referenced the need for the Jays to show financial stability after the Commission's approval. Thus, the Rocks' reference to "contrary to the staff report" provided adequate notice to the Jays about issues the Council would address on appeal.

Moreover, the Jays admit they received Burkland's agenda report for the Council hearing at the same time they received the Rocks' notice of appeal, on the Friday before the Council hearing to be held on the following Tuesday. So the Jays knew the Rocks' grounds at the same time they knew of Burkland's explication of the Jays' operational

capacity and financial stability previously discussed in the agenda report for the Commission and attached staff analysis. There were no surprises. It is no wonder that Jay did not complain to the Council that he had no prior notice that the Council would consider whether he met the Standards and did not ask for a postponement to address those issues.

The Jays also alleged in the petition that they were not provided notice as required by the CMC. CMC section 2.80.080(D) provides in pertinent part that the notice of appeal "shall be in a form" and contain "*[a] brief description* of all grounds for making the appeal." (Italics added.) As the Jays noted in their petition, the form provided by the City instructs in pertinent part: "State the reason(s) for filing the appeal and specifically identify *the item(s) you are requesting to appeal*. Only item(s) specifically identified by you on this application will be considered for appeal." (Italics added.) The Jays alleged that the Council considered multiple items not on the form notice related to operational capacity, financial stability and economic conditions and this violated the direction on the form that only the specific "items" identified would be considered, thus the Council hearing violated the law and is a nullity.[35]

Even assuming the contention concerning the CMC section 2.80.080(D) is not forfeited for failure to raise it during the Council hearing and further assuming that a direction on a standardized form has the force of law, the plain meaning of the words "item(s) you are requesting to appeal" on the form appears to reference the specific decision of the commission, here the Commission's approval of the Jays' application.

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35 We note that the argument that minimum standards were not encompassed within the notice of appeal is inconsistent with the Mayor's understanding. During the Council hearing, the Mayor noted that the Rocks' appeal was based partially on the claim that the Commission's decision was "contrary to the staff report." Regarding the minimum standards, the Mayor said, "I think it is within the scope of being contrary to the staff report because that's one of the reasons why staff recommended against it." Jay did not dispute this statement.

The reference in CMC section 2.80.080(D), to "*a brief description of all grounds* for making the appeal" appears to pertain to the grounds for which the appeal is made to the "specific items," i.e., the decision. (Italics added.) The form provides barely a half inch of space to describe the specific grounds and the Rocks used all of that space in addition to space allotted for the next item and space at the bottom of the page to describe their grounds. Given the nature of Burkland's agenda report and the attached staff analysis, the Jays have not shown how the Rocks' shorthand reference to the Commission's decision being "contrary to staff report" does not qualify as a "brief description of the grounds" under the ordinance.

The Rocks have not pleaded facts showing that the notice they received insufficient.

b. Opportunity to Be Heard

The Jays complain in their petition that at the Council hearing, Jay was limited to three minutes, plus the additional minute he requested and rebuttal was not allowed. But again, Jay was silent on the matter. He never asked for additional time beyond that which was given, nor did he explain what he expected to cover if given additional time. The record discloses that Jay had an opportunity to be heard and was actually given all the additional time to speak that he requested. Indeed, the transcript of the Council hearing reveals that Jay squandered the first three minutes of his time complaining about how the City had been "hoodwinked" when it approved the Rocks' lease, complaining about how his "FBO building" (which was not actually limited to FBO use) was landlocked by the ramp space leased to the Rocks, and disparaging the Rocks' experience and management, instead of discussing his operational capability and his financial stability. In any event, there was subsequent colloquy with the council members about compliance with the Standards and Jay was not limited in the length of his responses to those questions. Thus, even if the Jays' claim concerning the time limits on Jay's presentation and the lack of

rebuttal opportunity were not forfeited, the Jays have still failed to state a claim of unfair hearing based on those time limits.

c. Right to Cross-examination

For the first time, the Jays complain on appeal that, "Jay was given no right to cross-examine any of Burkland's, the City Attorney's or the Rocks' hearing claims." But he provides no legal authority indicating he was entitled to cross-examine. This contention is forfeited for the reason Jay failed to request cross-examination at the Council hearing and because he failed to support the claim in his briefing with legal authority. We may properly disregard contentions perfunctorily asserted without development. (*Tilbury Contractors, Inc. v. State Compensation Insurance Fund* (2006) 137 Cal.App.4th 466, 482; *Placer Ranch Partners v. County of Placer* (2001) 91 Cal.App.4th 1336, 1343, fn. 9.)

K. Substantive Due Process/Impairment of Contract Rights

The Jays alleged in their petition that the Council "revoked [the Jays'] right to perform the FBO function and impaired value of FBO building, leasehold interest, and contract rights." They further alleged that the Council "wrongfully revoked Jay's Airport Commission granted entitlement and that revocation substantially impaired the July 6, 1988, contract (exhibit V) by stripping the core element of the consideration exchanged in the contract, the uses to which Guillon could put the Building."

The Jays claim they have contractual rights to operate an FBO at the airport and to lease the apron. As we have discussed *ante*, Guillons' assignment of the lease, exhibit V, did not give the Jays the right to establish an FBO or the right to the City's approval of their FBO application. The Jays did not have an existing right to use the apron, and as Jay acknowledged at the Council hearing, his effort to arrive at an agreement with the Rocks for use of their apron space had been unsuccessful.

Finally, even if the Jays did have these alleged contractual rights, any such rights would be conditional upon their satisfaction of the Standards, which they had not yet

done. Again, there is nothing in the pleadings or the matters to which we take judicial notice that indicates the Jays are not free to submit another application, this time demonstrating the operational capability and financial stability they were going to have to show to the Commission even if they had prevailed at the Council hearing.

Accordingly, even assuming their impairment of contract and substantive due process claims are not forfeited for failure to raise them at the Council hearing, we conclude that the Jays have failed to allege facts supporting those claims.

L. The City's FBO Contract with the Rocks

1. Additional Background and the Jays' Contentions

Separate from the deficiencies in their own application, the Jays alleged in the petition that the City's FBO agreement with the Rocks was the product of an unauthorized waiver of the Standards and was void from its inception. They also contend that the City waived the minimum Standards for the Rocks because of their familial relationship with Alicia Rock, thus the contract is void due to a conflict of interest. These claims sound in traditional mandate, thus requiring that the Jays plead facts showing the City acted arbitrarily, capriciously, or in a manner inconsistent with law. (Code Civ. Proc., § 1985; *Swanson v. Marin Municipal Water Dist.* (1976) 56 Cal.App.3d 512, 519.)

2. Validity of the Rocks' Contract

The petition alleged that in 2005, "Burkland 'approved' [the Rocks] performing the FBO function and leasing FBO property at the Airport because on October 17, 2005, [the Rocks] purchased the assets of Redding Aero. . . . The next day, October 18, 2005, [the Rocks] 'took over' the FBO" and on July 20, 2007, the Rocks entered into their current contract with the City. The Jays acknowledge in their petition and the record further shows that the contract was approved by the Commission. A review of the contract reveals that it was signed by Gregory T. Jones, City Manager and approved as to form by Assistant City Attorney Lori J. Barker. In his agenda report for the September 2, 2009, Council hearing, Burkland explained that on April 24, 2007, the Airport

Commission approved the recommendation that the Council authorize a 25-year lease to Northgate to operate as an FBO and the Council approved the recommendation at its meeting of May 15, 2007. That these official governmental actions took place is not subject to dispute.

The Standards allow the Airport Commission the power to waive or modify the Standards in its discretion. Specifically, section IV(G) of the Standards provides that "[t]he Commission may modify, vary or waive, either upon its own initiative or upon request of an operator, any General Provision or Standard herein established, whenever it finds, in its sole discretion, that the enforcement of said Provision or Standard relative to the operator would be unreasonable, arbitrary or not in the best interests of Airport users." As noted the Rocks operated the FBO for two years after taking it over from the predecessor FBO. The Jays have not alleged facts supporting a claim that the Commission failed to find that applying the Standards to the Rocks would have been unreasonable or not in the best interests of Airport users and thus they have failed to state a claim that the City acted arbitrarily, capriciously, or in a manner inconsistent with law when the Commission and the Council approved the Rocks' contract with the City.

3. Alleged Conflict of Interest

The Jays asserted that the Rock's July 20, 2007, lease agreement is the product of a conflict of interest and is therefore void based on illegality. The Jays allege that Alicia Rock served as an attorney in the city attorney's office since 1999. While Ms. Rock had provided legal services to the Commission, she stopped doing so "near the end of 2005" after the Rocks " 'took over' the FBO business and property at the airport" according to the petition. The Jays alleged that "as the daughter of the beneficiary of the 7/20/07 contract, Alicia Rock had a personal interest in her parents' contract with the city" and Alicia Rock influenced Burkland to engage in dishonest conduct before the Commission and the Counsel. The petition alleges that "the influence Alicia Rock exerted over Burkland was demonstrated by the concessions he made to her parents" relative to the

Rocks performing as an FBO. The petition alleges that these "concessions" were a series of things Burkland did, including: without authority, allowing the Rocks to perform the FBO function without Commission approval and without first requiring that they demonstrate operational capacity and financial stability; without authority, allowing the Rocks to "go into possession of approximately $1 million of public property without a writing"; and "while illegally exempting" the Rocks from the Standards, imposing those requirements on the Jays "in an effort to prevent competition with the Rocks." However, the petition does not allege any facts establishing that Alicia Rock did or said anything to Burkland amounting to influence of any sort.

The Jays allege in the petition that Alicia Rock had a common law personal conflict of interest. They also alleged Ms. Rock had an indirect financial conflict of interest under Government Code section 1090, which prohibits a government official from making contracts in their official capacity in which they have a financial interest.

There is overlap between the common law conflict of interest and the financial conflict of interest provisions in Government Code section 1090 because the common law rule encompasses both financial and nonfinancial interests that could result in divided loyalty. (*Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261, 301.) In advancing their common law theory, the Jays rely on *Clark, supra,* 48 Cal.App.4th 1152. In that case, a city council member voted to deny the petitioners' permit to build a condominium because the height and lot coverage of the proposed structure would interfere with the use or enjoyment of other property in the area. (*Id*. at p. 1172.) The council member himself expressed his belief that the project would impact the view of the ocean from homes that were located behind it. (*Ibid*.) The court reasoned that because that council member lived one block behind the petitioner's property, he stood to benefit personally by voting against their project. (*Ibid*.)

To establish a violation of Government Code section 1090's financial conflict of interest provisions, the following must be proved: (1) the government official or

employee *participated in the making of a contract* in their official capacities; and (2) the government official or employee had a cognizable financial interest in that contract. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1074.) For purposes of section 1090, the making of a contract encompasses the official's activities in "the planning, preliminary discussion [and] compromises . . . that [leads] up to the formal making of the contract." (*People v. Honig* (1996) 48 Cal.App.4th 289, 315.)

Whether the alleged conflict is based on common law principles or section 1090, for those rules to apply, it is clear that the government officer must in some way participate in or influence the decision to enter into a contract or the making of the contract. The Jays' petition goes to great lengths to establish what it called a "potential financial interest" possessed by Alicia Rock. However, the petition does not assert *facts* establishing that Alicia Rock participated in making her parent's contract or that she influenced the decision makers or staff who approved it. Rather, the petition alleges only innuendo and conclusory statements. Additionally, the Jays do not allege that Alicia Rock had any role in advising the Airport Commission or the Council on matters related to the Jays' FBO application and no evidence of such appears in the record.

As we have discussed, Alicia Rock's review of the various 1988 contracts at issue took place in 2000, about five years *before* either the Jays or the Rocks became involved with FBO operations at the airport in 2005. As the trial court observed, there is no indication in the record that Ms. Rock was involved with any matters before the Commission after 2005. As noted, there are no actual facts alleged showing that she improperly influenced Burkland, the Commission or the Council regarding the Rocks' FBO enterprise. Indeed, the July 20, 2007, lease agreement is not even signed by Burkland. It is signed by the previous city manager, Gregory T. Jones. According to the petition, Burkland did not become city manager until September 2007.

Accordingly, the Jays have failed to state facts showing the Rocks' contract with the City was void because of a conflict of interest.

M. Leave to Amend

We review the trial court's decision denying leave to amend for abuse of discretion. The Jays bear "the burden of showing such abuse" and we will "reverse only where there is a manifest abuse of discretion in refusing leave to amend." (*Hilton v. Bd. of Supervisors* (1970) 7 Cal.App.3d 708, 716.)

In the instant matter, the Jays have failed to offer an explanation in their opening brief of how the defects could be cured by amendment. The Jays simply did not demonstrate their ability to perform the FBO services in compliance with the City's Standards because they did not demonstrate operational capacity or financial stability to either the Commission or the Council. The Jays have not and cannot allege any new facts to establish otherwise. If circumstances have changed, their remedy is to submit a new FBO application meeting the Standards.

We conclude that the trial court did not err in denying the Jays' leave to amend.

DISPOSITION

The judgment is affirmed in both case Nos. C068400 and C071967. The Jays shall pay the Rocks' and the City's costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(1), (5).)

/s/
MURRAY, J.

We concur:

/s/
RAYE, P. J.

/s/
ROBIE, J.